Supreme Court, U.S.
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No. 06-647

In The

Supreme Court of the United States

SEAN GRAHAM,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the State of Utah's aggravated, capital murder statute unconstitutional because it has two different alternative, mental states from which the prosecution can elect to prove as an element of aggravated murder?

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THE OPINION ENTERED BELOW

The opinion entered in this matter by the Supreme Court of the State of Utah entitled *State of Utah v. Sean Graham*, 143 P.3d 268 (Utah, 2006), 558 Utah Adv. Rep 3, 2006 UT 43, is included in the appendix hereto.

JURISDICTION

The judgment or order sought to be reviewed in this matter was entered by the Supreme Court of the State of Utah on August 8, 2006.

The statutory provision that confers on this Court jurisdiction to hear this matter is 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated § 76-5-201 provides, as follows:

> "(1)(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.
>
> (b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.
>
> (2) Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide,

homicide by assault, negligent homicide, or automobile homicide."

Utah Code Annotated § 76-5-202[1] provides, as follows:

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[1] Laws 2005, c. 143 rewrote this section which formerly provided:

"(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

"(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

"(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

"(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

"(d) the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, kidnapping, or child kidnapping;

"(e) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

"(f) the homicide was committed for pecuniary or other personal gain;

"(g) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

"(h) the actor was previously convicted of:

(Continued on following page)

"(i) aggravated murder, Section 76-5-202;

"(ii) murder, Section 76-5-203;

"(iii) aggravated assault, Subsection 76-5-103(2);

"(iv) mayhem, Section 76-5-105;

"(v) attempted murder, Section 76-5-203;

"(vi) kidnapping, Section 76-5-301;

"(vii) child kidnapping, Section 76-5-301.1;

"(viii) aggravated kidnapping, Section 76-5-302;

"(ix) rape, Section 76-5-402;

"(x) rape of a child, Section 76-5-402.1;

"(xi) object rape, Section 76-5-402.2;

"(xii) object rape of a child, Section 76-5-402.3;

"(xiii) forcible sodomy, Section 76-5-403;

"(xiv) sodomy on a child, Section 76-5-403.1;

"(xv) aggravated sexual abuse of a child, Section 76-5-404.1;

"(xvi) aggravated sexual assault, Section 76-5-405;

"(xvii) aggravated arson, Section 76-6-103;

"(xviii) aggravated burglary, Section 76-6-203;

"(xix) aggravated robbery, Section 76-6-302; or

"(xx) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(h);

"(i) the homicide was committed for the purpose of:

"(i) preventing a witness from testifying;

"(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;

"(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or

"(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

"(j) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is

(Continued on following page)

based on, is caused by, or is related to that official position, act, capacity, or candidacy;

"(k) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

"(l) the homicide was committed:

"(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or

"(ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

"(m) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

"(n) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

"(o) the victim was a person held or otherwise detained as a shield, hostage, or for ransom; or

"(p) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

"(2) Aggravated murder is a capital felony.

"(3)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another:

(Continued on following page)

"(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were

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"(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

"(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

"(b) Under Subsection (3)(a)(i), emotional distress does not include:

"(i) a condition resulting from mental illness as defined in Section 76-2-305; or

"(ii) distress that is substantially caused by the defendant's own conduct.

"(c) The reasonableness of an explanation or excuse under Subsection (3)(a)(i) or the reasonable belief of the actor under Subsection (3)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

"(d) This affirmative defense reduces charges only as follows:

"(i) aggravated murder to murder; and

"(ii) attempted aggravated murder to attempted murder." Laws 2006, c. 191, in subsec. (1)(d), substituted "incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit" for "while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit,".

killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, kidnapping, or child kidnapping;

(e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);

(f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(g) the homicide was committed for pecuniary or other personal gain;

(h) the defendant committed, or engaged or employed another person to commit the homicide

pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(i) the actor previously committed or was convicted of:

(i) aggravated murder, Section 76-5-202;

(ii) attempted aggravated murder, Section 76-5-202;

(iii) murder, Section 76-5-203;

(iv) attempted murder, Section 76-5-203; or

(v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);

(j) the actor was previously convicted of:

(i) aggravated assault, Subsection 76-5-103(2);

(ii) mayhem, Section 76-5-105;

(iii) kidnapping, Section 76-5-301;

(iv) child kidnapping, Section 76-5-301.1;

(v) aggravated kidnapping, Section 76-5-302;

(vi) rape, Section 76-5-402;

(vii) rape of a child, Section 76-5-402.1;

(viii) object rape, Section 76-5-402.2;

(ix) object rape of a child, Section 76-5-402.3;

(x) forcible sodomy, Section 76-5-403;

(xi) sodomy on a child, Section 76-5-403.1;

(xii) aggravated sexual abuse of a child, Section 76-5-404.1;

(xiii) aggravated sexual assault, Section 76-5-405;

(xiv) aggravated arson, Section 76-6-103;

(xv) aggravated burglary, Section 76-6-203;

(xvi) aggravated robbery, Section 76-6-302; or

(xvii) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(j);

(k) the homicide was committed for the purpose of:

(i) preventing a witness from testifying;

(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;

(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or

(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

(l) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or

other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(n) the homicide was committed:

(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or

(ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

(o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(q) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical

abuse, or serious bodily injury of the victim before death; or

(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind. (2) Aggravated murder is a capital felony. (3)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (3)(a)(i), emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (3)(a)(i) or the reasonable belief of the actor under Subsection (3)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder."

Utah Code Annotated § 76-5-203 provides, as follows:

"(1) As used in this section, 'predicate offense' means:

(a) a violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

(k) rape under Section 76-5-402;

(*l*) object rape under Section 76-5-402.2;

(m) forcible sodomy under Section 76-5-403;

(n) aggravated sexual assault under Section 76-5-405;

(o) arson under Section 76-6-102;

(p) aggravated arson under Section 76-6-103;

(q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302;

(u) escape or aggravated escape under Section 76-8-309; or

(v) a felony violation of Subsection 76-10-508(2) regarding discharge of a firearm or dangerous weapon.

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5. (3)(a) Murder is a first degree felony.

(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life. (4)(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter."

Utah Code Annotated § 76-2-103 provides, as follows:

"A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his

conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint."

The Fifth Amendment of the United States Constitution provides, as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

> life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Eighth Amendment of the United States Constitution provides, as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment of the United States Constitution provides, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural Summary.

On March 10, 2004, an Information was filed against the Petitioner, wherein he was charged with: (1) aggravated murder, a capital offense (U.C.A. § 76-5-202); (2) aggravated kidnapping (U.C.A. § 76-5-302); (3) theft of an operable motor vehicle (U.C.A. § 76-6-412); and, (4) theft (U.C.A. § 76-6-404). (*State v. Graham*, 143 P.3d 268, 271

(Utah 2006.) After a preliminary hearing was held, the magistrate issued an order binding over the Petitioner to stand trial on all four counts. (*Ibid.*)

On June 18, 2004, an Amended Information was filed against the Petitioner, wherein he was once again charged with: (1) aggravated murder, a capital offense (U.C.A § 76-5-202); (2) aggravated kidnapping (U.C.A. § 76-5-302); (3) theft of an operable motor vehicle (U.C.A. § 76-6-412); and, (4) theft (U.C.A. § 76-6-404).

On September 16, 2004, Petitioner filed a motion to quash the Amended Information, wherein he challenged the validity of the bind-over order on the charge of aggravated murder. (*Id.* at p. 271-272.)

On December 28, 2004, the Fifth Judicial District Court in and for Iron County, State of Utah, entered an order granting Petitioner's motion to quash an order binding him over to stand trial for aggravated murder. (See Appendix, Findings of Fact and Order Granting Defendant Sean Graham's Motion to Quash Amended Information; and Bind-Over Order.) The District Court held that the State of Utah did not present sufficient evidence at the preliminary hearing for the court to find probable cause to believe that Defendant Sean Graham had the specific intent to cause the death of Anson Arnett. (*Ibid.*) The district court further found that the prosecution did not present sufficient evidence at the preliminary hearing to sustain a finding that there was probable cause to believe that the Petitioner intentionally or knowingly caused the death of Anson Arnett within the meaning of U.C.A. 76-5-202(1). (*Ibid.*) Therefore, the District Court held that Petitioner was not required to stand trial on the charge of aggravated murder. (*Ibid.*)

The State of Utah filed a petition for review of the District Court's order quashing portions of the Amended Information in the Supreme Court of the State of Utah. The Petitioner also filed a petition review in the Supreme Court of the State of Utah.

The Supreme Court of the State of Utah granted both petitions for review of the District Court's order concerning the motion to quash. Both parties filed briefs in the Supreme Court of the State of Utah in support of and in opposition to their respective petitions. Petitioner raised the federal questions sought to be reviewed in this case in his brief and at oral argument before the Supreme Court of the State of Utah. Petitioner argued before the Supreme Court of the State of Utah that Utah's aggravated murder statute could not have two different, alternate mental states (i.e. "intentionally" or "knowingly"); and, for the Supreme Court of the State of Utah to hold otherwise would mean that Utah's aggravated murder statute violated the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

On August 8, 2006, the Supreme Court of the State of Utah published its decision, which is the subject matter of this Petition for Certiorari. In its published decision, the Supreme Court of the State of Utah held that "the requisite mental state for first degree murder is 'intentionally or knowingly'." (*State v. Graham, supra,* 143 P.3d 268, 272-274.) The decision issued by the Supreme Court of the State of Utah did not address Petitioner's argument that its aggravated murder statute would violate the United States Constitution if it had two different, alternative mental states. (*Id.* at pp. 272-274.)

B. Factual Summary.

Maximum Life Skills Academy (the Academy) is a behavior modification facility for troubled teenage boys whose parents voluntarily place them in the Academy and assign legal guardianship to the facility. (*State v. Graham*, *supra*, 143 P.3d at pp. 270-271.) Petitioner was scheduled to leave the Academy on March 4, 2004, but one week before his scheduled departure, staff members discovered that he and his friend Jesse Simmons had cheated on many of their twelfth-grade English assignments. (*Ibid.*) The Academy's director required Petitioner and Simmons to make up those assignments, which ultimately led to a postponement of their release date. (*Ibid.*) Petitioner and Simmons subsequently exhibited poor behavior because of their anger about the postponement. (*Ibid.*) The Academy's staff reprimanded Petitioner and Simmons for the poor behavior by placing all six boys attending the Academy on "lock-down," a revocation of all privileges. (*Ibid.*)

As testified by one of the other four boys at the Academy, either the night before or the morning of the murder, staff members heard Petitioner and Simmons "talkin' about running." (*Ibid.*) To help prevent escape, the staff asked Petitioner, Simmons, and two other boys to sleep on their mattresses in the front room where the night counselor could watch them closely. (*Ibid.*)

On March 8, 2004, night counselor Anson Arnett arrived at the Academy around 9 p.m. (*Ibid.*) He was the only counselor on duty that night. (*Ibid.*) After telling the four boys upstairs to be quiet and to go to bed, Arnett went downstairs to enable the alarm and to check on the two boys sleeping there. (*Ibid.*) Petitioner and Simmons had been whispering to one another, and as soon as Arnett

went downstairs, they got out of bed. (*Ibid.*) Simmons pulled an aluminum baseball bat out of his sheets, and he and Petitioner crouched at the top of the stairs where Arnett could not see them. (*Ibid.*)

Only Petitioner could see Arnett ascend the staircase. (*Ibid.*) Simmons could not. As soon as Petitioner saw Arnett's head, he glanced over to Simmons – when their eyes met, Simmons stood up and hit Arnett on the back of the head with the aluminum bat. Banging his head against the wall, Arnett fell. (*Ibid.*)

Arnett was not knocked unconscious from this blow. (*Ibid.*) In fact, Arnett stood up while Petitioner and Simmons asked, "What happened? Are you alright?" The two boys told Arnett that he had fallen. (*Ibid.*) Arnett walked into his office and shut the door, at which point Petitioner asked Simmons, "Why didn't you knock him out the first time?" (*Ibid.*)

When Arnett reappeared a few minutes later, he walked down the stairs and out the front door. (*Ibid.*) Petitioner and Simmons, again, crouched in the same position at the top of the stairs and waited for Arnett to appear. (*Ibid.*) Arnett reentered the house and moved up the stairs. (*Ibid.*) Petitioner glanced at Simmons. (*Ibid.*) Once their eyes met, Simmons hit Arnett a second time on the back of the head with the bat. (*Ibid.*) This time when Arnett fell, he started convulsing. (*Ibid.*) Petitioner frisked Arnett for his keys to the Academy and its van and then stuffed him into a closet, with his head on the floor and his legs in the air over a filing cabinet. (*Ibid.*) Petitioner and Simmons locked the door with a deadbolt that could only be opened with a key. (*Ibid.*) There was no doorknob. (*Ibid.*)

Petitioner and Simmons collected their belongings and fled in the Academy's van. (*Ibid.*) Arnett died the following night from blunt force trauma to the head. (*Ibid.*)

ARGUMENT

In Utah, "[c]riminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide." U.C.A. § 76-5-201(2). "A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being. . . ." U.C.A. § 76-5-201(1)(a)).

According to U.C.A § 76-5-203, "[c]riminal homicide constitutes murder if:

> (a) the actor intentionally or knowingly causes the death of another;
>
> (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
>
> (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
>
> (d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;" U.C.A. § 76-5-203(2).

According to U.C.A. § 76-5-202(1), "[c]riminal homicide constitutes aggravated murder if the actor intentionally *or* knowingly causes the death of another under any of the following circumstances: . . . ." (Italic emphasis added.)

The terms "intentionally" and "knowingly" are defined in U.C.A. § 76-2-103(1) and (2), as follows:

> "A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

Thus, according to the Supreme Court of Utah, "it is certainly possible that a knowing crime can be committed unintentionally." (*State v. Graham*, *supra,* 143 P.3d at p. 273.) "That is, a person can know that a certain action will cause a certain result without that result being the person's conscious objective." (*Ibid.*)

In the court below, Petitioner argued that a proper interpretation of U.C.A. § 76-5-202(1) required that meaning be given to both of the words, "intentionally" and "knowingly," without omitting the requirement that a person acted with the conscious objective or desire to cause the death of another. The usual rules of statutory construction give effect, if possible, to every clause and word of a

statute. (*Clark v. Arizona,* 126 S.Ct. 2709, 2723 (2006).) The word "intentionally," as used in U.C.A. § 76-5-202(1), means *a person must act with the conscious objective or desire to cause the death of another.* The word "knowingly," as used in U.C.A. § 76-5-202(1), means that *a person must be subjectively aware of the risk posed by the nature of his conduct.* Petitioner contends that in order to commit the crime of aggravated murder a person must be *subjectively* aware of the grave risk of death posed by the nature of his conduct *and* must act with the *conscious objective or desire* to cause the death of another. A person's awareness of his conduct is critical in that a person must subjectively understand, appreciate, and/or comprehend that the conduct in which he is engaging in is reasonably certain to accomplish his conscious objective (i.e. the death of another).

However, the Supreme Court of Utah held that the State can obtain a conviction for aggravated murder by proving that the defendant acted either "intentionally *or* knowingly" when causing the death of another. (*State v. Graham, supra,* 143 P.3d at pp. 272-274.) Stated another way, the State, is *not* required to prove the defendant acted both intentionally *and* knowingly in causing the death of another. Consequently, the State is entitled to elect in any given prosecution of any given defendant, at any given point in time during the prosecution, whether it is going to prove the defendant merely acted "knowingly," as opposed to his or her having acted "intentionally." Petitioner argued below, to no avail, that such an interpretation would violate the pertinent provision of the United States Constitution. In the opinion published by the Supreme Court of Utah, the Court failed to address this fundamental problem with its aggravated murder statute.

Petitioner has not been able to locate any published decision that addresses this issue.

In the court below, Petitioner argued that prior decision issued by the Supreme Court of Utah explained the critical difference between first and second degree murder is that first degree murder requires a "conjoining of" "intentionally *and* knowingly" with enumerated acts, which is not required for second degree murder, as follows:

> "The critical difference between murder in the first and second degrees is that the former requires the actor to cause intentionally *and* knowingly the death of another under aggravated circumstances while the latter requires an intentional *and* knowing death or the commission of listed acts of aggravation which cause death or recklessness with a depraved indifference to human life which eventuates in death. First degree murder in brief requires a conjoining of "intentional *and* knowing" with enumerated acts but second degree murder is specified in the disjunctive, thereby not requiring this union." (*State v. Pierre,* 572 P.2d 1338, 1354, (Utah 1977).)

Petitioner also directed the Supreme Court of Utah's attention to numerous of its other published decisions which provided that a conviction for aggravated murder required that the defendant "intentionally and knowingly" cause the death of another. (*State v. Shaffer*, 725 P.2d 1301, 1313 (Utah 1986); *State v. Tuttle,* 780 P.2d 1203, 1215 (Utah 1989); and, *State v. Johnson,* 740 P.2d 1264, 1266 (Utah 1987).)

Similarly, in many other states the critical difference between first degree murder and second degree murder is the conscious objective or desire to kill, whether it be

labeled as intentionally *and* knowingly, specific intent, premeditation and deliberation, deliberate, etc. (See *Commonwealth v. DeHart*, 516 A.2d 656, 669 (Penn. 1986); *State v. Reese,* 259 N.W.2d 771, 778 (Iowa 1977); *Stokes v. Warden,* 306 S.E.2d 882, 885 (Virginia 1983); *Terrell v. State,* 285 N.W.2d 601, 603 (Wisconsin 1979); *State v. Ferguson,* 270 S.E.2d 166, 170 (West Virginia 1980); *State v. Griffin,* 302 S.E.2d 447, 451 (N. Carolina 1983); *State v. Valenzuela,* 559 P.2d 402, 407 (New Mexico 1976); *State v. Marvin,* 606 P.2d 406, 408 Arizona 1980); *People v. Sneed,* 514 P.2d 776, 778 (Colo. 1973); *People v. Vail,* 227 N.W.2d 535, 538 (Michigan 1975); *State v. Kerley,* 696 P.2d 975, 977 (Kansas 1985); *State v. Seals*, 515 S.W.2d 481, 486 (Missouri 1974); *State v. Payne,* 289 N.W.2d 173, 177-178 (Nebraska 1980).)

In the court below, Petitioner also argued that if the Supreme Court interpreted the aggravated murder statute to allow a conviction upon proof of either "intentionally" or "knowingly," then in most instances there would be little, if any, difference between the crimes of murder and aggravated murder under Utah's murder statutes.

In *State v. Fontana*, 680 P.2d 1042, 1047 (Utah 1984), the Supreme Court of Utah analyzed the culpable mental state for depraved indifference murder within the meaning of U.C.A. § 76-5-203(1)(c) and held the culpable mental state for depraved indifference murder is that the defendant acted with knowledge that his conduct created a grave risk of death to another. (*Fontana, supra,* 680 P.2d at pp. 1046-1047.) The Court explained the difference between first degree murder and depraved indifference second degree murder is that in order to be guilty of first degree murder the defendant must have the "'conscious

objective' of causing the victim's death." (*Fontana, supra,* 680 P.2d at p. 1047.)[2]

Petitioner argued below that if the words "intentionally" and "knowingly," as used in U.C.A. § 76-5-202(1), are *not* read in the conjunctive (as opposed to in the disjunctive), Utah's statutory structure of graded definitions of homicide will no longer exist. Petitioner further argued that based on the State's interpretation of "knowingly," as used in U.C.A. § 76-5-202(1), there would be no difference in the *mens rea* for depraved indifference murder and aggravated murder; and, often times there would be no difference between murder as defined by U.C.A. § 76-5-203(2)(B) and aggravated murder. The crimes would have the same *mens rea* in that they would, in essence, require that a person knowingly engage in conduct that was "reasonably certain" to cause the death of another. The opinion issued by the Supreme Court of Utah did not address this issue either.

In the court below, Petitioner also argued that if the *mens rea* for aggravated murder were interpreted in the disjunctive, as opposed to conjunctive, the crimes of murder and aggravated murder would have an objective, as opposed to a subjective standard, with respect to the defendant's mental state. Under Utah law, depraved indifference murder, is viewed objectively, as opposed to subjectively, and the actual subjective mental state of the defendant is *not* taken into consideration. (*Fontana, supra,*

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[2] See also *State v. Powell,* 872 P.2d 1027, 1030 (Utah 1994) [the *mens rea* required for a conviction of depraved indifference murder does not require that the defendant have as his conscious objective or desire to cause the death of another; the circumstances under which the defendant acted are viewed objectively from the standpoint of a reasonable person and not subjectively from the state of such defendant's mind].

680 P.2d at p. 1047.) Under the Supreme Court of Utah's interpretation of Utah's aggravated murder statute (U.C.A. § 76-5-202(1)), the defendant's subjective mental state would *not* be taken into consideration for aggravated murder either because the State would only have to prove that the defendant acted "knowingly."[3] Moreover, a disjunctive interpretation of U.C.A. § 76-5-202(1) creates a much lower standard of proof in that the State would no longer need to prove that the murder was committed "intentionally," it would merely have to prove that the murder was committed "knowingly."

In *State v. Egbert,* 748 P.2d 548, 559 (Utah 1988), the Supreme Court of Utah explained "[i]t is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" (*State v. Egbert, supra,* 748 P.2d at p. 559, quoting *U.S. v. Batchelder,* 442 U.S. 114, 123 (1979).) This fundamental principal applies to substantive provisions of criminal statutes. (*Ibid.*) "A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." (*Ibid.*)

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[3] Criminal statutes are to be construed in light of the background rules of the common law in which the requirement of *mens rea* for a crime is firmly embedded. *Staples v. U.S.,* 511 U.S. 600, 605 (1994); *U.S. v. United States Gypsum Co.,* 438 U.S. 422, 436-437 (1978). Under the common law, the State of Utah had to prove beyond a reasonable doubt the defendant had the specific intent to kill in order to obtain a conviction for first degree murder. *State v. Dewey,* 127 P. 275, 278-279 (Utah 1912); *State v. Stenbeck,* 2 P.2d 1050, 1053-1054 (Utah 1931); *State v. Trujillo,* 214 P.2d 626, 633-634 (Utah 1950). In *State v. Castonguay,* 663 P.2d 1323, 1327 (Utah 1983), the Supreme Court of Utah used the term "specific intent" when describing the requisite *mens rea* that a defendant must possess in order to be found guilty of first degree murder.

In *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972), the United States Supreme Court explained that vague criminal statutes violate basic principles of due process, as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Furthermore, in *State v. Tuttle, supra,* 780 P.2d at 1216-1217 (Utah 1989), the Supreme Court of Utah acknowledged that the Eighth and Fourteenth Amendments to the federal constitution require every state to "define the crimes for which death may be the sentence in a way that obviates standardless discretion." (*State v. Tuttle, supra,* 780 P.2d at 1216-1217, quoting *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980).) These criminal statutes must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Ibid.*) If a statutory scheme does not provide "a meaningful distinction between capital and noncapital murders," the statutory scheme will be unconstitutional under the federal constitution. (*Ibid.*)

In *State v. Fedorowicz,* 2002 UT 67, ¶ 48, 52 P.3d 1194, 1206, the Supreme Court of Utah recognized that criminal laws must be written so there are significant differences between offenses and so that the same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge.[4]

Under the Supreme Court of Utah's interpretation of Utah's aggravated murder statute, a person of ordinary intelligence is not able to understand the requisite *mens rea* for the commission of the crime of aggravated murder. Further, a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited under the aggravated murder statute, so that he may act accordingly. Additionally, the State's interpretation of the aggravated murder statute does *not* provide explicit standards for those who apply them. To the contrary, police, prosecutors, judges, and juries would be able to decide who will be prosecuted for aggravated murder, as opposed to depraved indifference murder, on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Furthermore, prosecutors will be able to decide on ad hoc subjective basis whether they will prove the defendant acted "knowingly," as opposed to "intentionally," when causing the death of another. Hence prosecutors will be able to arbitrarily

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[4] In *People v. Marcy,* 628 P.2d 69, 73 (Colo. 1981), the Supreme Court of Colorado explained that criminal statues are required to provide an adequate definition of the act and mental state of each offense so that fair warning if given to all person concerning the nature of proscribed conduct and the penalties therefore. Furthermore, criminal statutes are required to differentiate on reasonable grounds the more serious from the less serious criminal conduct and prescribe penalties that are proportionate to the seriousness of the offense. (*Ibid.*) The equal protection clause of the Fourteenth Amendment to the United States Constitution mandates a rationale and even-handed application of the law. (*Ibid.*)

and subjectively decide whether they will use the higher or the lower of the two pertinent *mens rea*. Finally, under the Supreme Court of Utah's interpretation of Utah's aggravated murder statute, there is not a meaningful distinction between murder and aggravated murder and, therefore, Utah's aggravated murder statute is unconstitutional. (*Godfrey v. Georgia*, *supra*, 446 U.S. 420, at p. 428.)

The Supreme Court of Utah was required to interpret Utah's aggravated murder statute in a manner that was consistent with state and federal law in order to avoid striking it down as unconstitutional. (*Tuttle, supra,* 780 P.2d at p. 1217.) However, the Supreme Court of Utah failed to do so. Therefore, this Court should grant certiorari in this matter in order to address the unconstitutionality of Utah's aggravated murder statute.

CONCLUSION

For the reasons set forth hereinabove, Petitioner respectfully requests that this Court issue a writ of certiorari in order to review the decision of the Supreme Court of the State of Utah.

Respectfully submitted,

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APPENDIX

2006 UT 43

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - ooOoo - - - -

State of Utah
Plaintiff, Appellant,
and Cross-Appellee,

v.

Sean Graham,
Defendant, Appellee,
and Cross-Appellant.

Nos. 20050046
20050051

FILED
August 8, 2006

- - -

Fifth District, Cedar City
The Honorable G. Michael Westphall
No. 041500145

Attorneys: Mark L. Shurtleff, Att'y Gen., Laura B. Dupaix, Asst. Att'y Gen., Salt Lake City, Scott Garrett, Cedar City, for plaintiff
Douglas D. Terry, St. George, Duncan M. James, David M. Kindopp, Ukiah, CA, for defendant

- - -

WILKINS, Associate Chief Justice:

¶1 Defendant Sean Graham is a seventeen-year-old who, together with another boy, beat his group home counselor twice over the head with a baseball bat and stuffed him in a locked closet. The State charged Graham with, among other crimes, aggravated murder and kidnapping, but the district court refused to bind Graham over on those two charges. The case is now before us on interlocutory appeal. We granted review of the following

six issues, three on direct appeal and three on cross-appeal:

(1) Whether the State presented sufficient evidence of the Defendant's mental state at the preliminary hearing stage to support a charge of aggravated murder;

(2) Whether the State demonstrated a kidnapping as an aggravating factor pursuant to Utah Code section 76-5-202(1)(d);

(3) Whether the State demonstrated that the homicide was accomplished in the course of committing the kidnapping as a predicate offense pursuant to Utah Code section 76-5-203(2)(d);

(4) Whether the Defendant kidnapped the victim within the meaning of Utah Code section 76-5-301;

(5) Whether facilitation of the Defendant's departure from a group home may be construed as "other personal gain" within the meaning of Utah Code section 76-5-202(1)(f); and

(6) Whether Utah Code section 76-5-202(1)(f) is unconstitutionally vague or overbroad.

¶2 We affirm the district court's determination at the preliminary hearing that Graham kidnapped Arnett within the meaning of Utah Code section 76-5-301. We reverse, however, the court's conclusions regarding the insufficiency of evidence for the aggravated murder mens rea, for kidnapping as an aggravating factor, and for kidnapping as a predicate offense. We also note that the issues involving Utah Code section 76-5-202(1)(f) are moot because the State has dropped its "other personal gain" argument.

BACKGROUND

I. FACTUAL BACKGROUND

¶3 Maximum Life Skills Academy (the Academy) is a behavior modification facility for troubled teenage boys whose parents voluntarily place them in the Academy and assign legal guardianship to the facility. Graham was scheduled to leave the Academy on March 4, 2004, but one week before his scheduled departure, staff members discovered that he and his friend Jesse Simmons had cheated on many of their twelfth-grade English assignments. The Academy's director required Graham and Simmons to make up those assignments, which ultimately led to a postponement of their release date. Graham and Simmons subsequently exhibited poor behavior because of their anger about the postponement. The Academy's staff reprimanded Graham and Simmons for the poor behavior by placing all six boys attending the Academy on "lockdown," a revocation of all privileges.

¶4 As testified by one of the other four boys at the Academy, either the night before or the morning of the murder, staff members heard Graham and Simmons "talkin' about running." To help prevent escape, the staff asked Graham, Simmons, and two other boys to sleep on their mattresses in the front room where the night counselor could watch them closely.

¶5 On March 8, 2004, night counselor Anson Arnett arrived at the Academy around 9 p.m. He was the only counselor on duty that night. After telling the four boys upstairs to be quiet and to go to bed, Arnett went downstairs to enable the alarm and to check on the two boys sleeping there. Graham and Simmons had been whispering to one another, and as soon as Arnett went downstairs,

they got out of bed. Simmons pulled an aluminum baseball bat out of his sheets, and he and Graham crouched at the top of the stairs where Arnett could not see them.

¶6 Only Graham could see Arnett ascend the staircase. Simmons could not. As soon as Graham saw Arnett's head, he glanced over to Simmons – when their eyes met, Simmons stood up and hit Arnett on the back of the head with the aluminum bat. Banging his head against the wall, Arnett fell.

¶7 Arnett was not knocked unconscious from this blow. In fact, Arnett stood up while Graham and Simmons asked, "What happened? Are you alright?" The two boys told Arnett that he had fallen. Arnett walked into his office and shut the door, at which point Graham asked Simmons, "Why didn't you knock him out the first time?"

¶8 When Arnett reappeared a few minutes later, he walked down the stairs and out the front door. Graham and Simmons, again, crouched in the same position at the top of the stairs and waited for Arnett to appear. Arnett reentered the house and moved up the stairs. Graham glanced at Simmons. Once their eyes met, Simmons hit Arnett a second time on the back of the head with the bat. This time when Arnett fell, he started convulsing. Graham frisked Arnett for his keys to the Academy and its van and then stuffed him into a closet, with his head on the floor and his legs in the air over a filing cabinet. Graham and Simmons locked the door with a deadbolt that could only be opened with a key. There was no doorknob.

¶9 Graham and Simmons collected their belongings and fled in the Academy's van. The four boys remaining in the house tried to call for help, but Graham and Simmons had cut the phone lines. Consequently, two of the boys ran

over two miles to a counselor's home for help. The counselor drove back to the Academy with the boys and helped Arnett until the ambulance and police arrived.

¶10 Arnett died the following night from blunt force trauma to the head.

II. PROCEDURAL BACKGROUND

¶11 The State charged Graham with aggravated murder, kidnapping, theft of an operable motor vehicle, and theft. The State also charged Graham with four statutory aggravators for the murder count: (1) the homicide was committed while the actor was engaged in the commission of kidnapping;[1] (2) the homicide was committed for the purpose of effecting Graham's or another's escape from lawful custody;[2] (3) the homicide was committed for a pecuniary gain;[3] and (4) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner.[4]

¶12 After a preliminary hearing, the magistrate bound Graham over on all counts but on only two of the statutory aggravators to murder: (1) the homicide was committed while the actor was engaged in the commission of a kidnapping, and (2) the homicide was committed for pecuniary or other personal gain.

¶13 Graham moved to quash the bindover order, and the district court found that the evidence did not support a

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[1] Utah Code Ann. § 76-5-202(1)(d) (2005).

[2] *Id.* § 76-5-202(1)(f).

[3] *Id.* § 76-5-202(1)(g).

[4] *Id.* § 76-5-202(1)(r).

reasonable belief that Graham "had the specific intent to cause the death" of the victim. The district judge also found that the homicide did not occur while Graham "was engaged in the commission of . . . [a] kidnapping or aggravated kidnapping."

¶14 Absent the requisite intent to kill Arnett, the State was required to reduce Graham's aggravated murder charge to simple murder. The trial court denied the prosecution's request to proceed on the theory of felony murder, concluding that the homicide did not occur during the commission of a kidnapping.

¶15 This case is now before us on interlocutory appeal.

ANALYSIS

¶16 This court has jurisdiction over "interlocutory appeals from any court of record involving a charge of a first degree or capital felony."[5] Because the six issues before us are inquiries of proper statutory interpretation, they are matters of law, which we review for correctness.[6] Accordingly, we afford no deference to the determinations of lower courts.[7]

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[5] Utah Code Ann. § 78-2-2(3)(h) (2005).

[6] *See Jedrziewski v. Smith*, 2005 UT 85, ¶ 4, 128 P.3d 1146 ("The district court's decision was a matter of law, so we review for correctness.").

[7] The recently-adopted standard of review found in *State v. Virgin*, 2006 UT 29, ___ P.3d ___, which requires "some deference" to a magistrate's determinations from the preliminary hearing, does not apply in this case because the six issues before us are matters of statutory interpretation and are thus strict questions of law reviewed for

(Continued on following page)

¶17 As we set forth the correct statutory interpretations for each of these issues before us and apply the given facts to make our final determinations of law, we must employ the bindover standard implemented in preliminary hearings. "To bind a defendant over for trial, the State must show 'probable cause' at a preliminary hearing by 'present[ing] sufficient evidence to establish that the crime charged has been committed and that the defendant committed it.'"[8] In other words, "to prevail at a preliminary hearing, the prosecution must . . . produce believable evidence of all the elements of the crime."[9] It is not necessary to actually prove the elements of the crime at a preliminary hearing. Instead, to obtain a bindover for trial, which is the stage at which this case reached appeal, the prosecution must produce sufficient evidence to reasonably conclude that the requisite elements were satisfied and that the defendant committed the crime.[10]

I. THE STATE PRESENTED SUFFICIENT EVIDENCE OF GRAHAM'S MENTAL STATE TO SUPPORT A CHARGE OF AGGRAVATED MURDER

¶18 The State argues that the trial court erroneously required specific intent under the aggravated murder statute. The State also asserts that it presented sufficient evidence of Graham's mental state to support a

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correctness and afforded no deference. The *Virgin* standard of review requiring "some deference" is limited to mixed questions of law and fact. *Id.* ¶ 26.

[8] *State v. Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300 (quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)).

[9] *Id.* ¶ 15.

[10] *See Virgin*, 2006 UT 29, ¶ 17.

charge of aggravated murder. Graham contends, however, that the trial court properly required specific intent – an intentional *and* knowing mental state – for aggravated murder and that the State failed to preserve an argument against the application of this mens rea by conceding that the law requires an intentional and knowing mental state. Moreover, Graham alleges that under a specific intent analysis, the State provided insufficient evidence to support the aggravated murder charge.

¶19 We first address the adequacy of the State's preservation of the trial court's application of specific intent. We then discuss the correct mental state for aggravated murder. Lastly, we turn to the sufficiency of the evidence to satisfy the requisite mens rea.

¶20 In Utah, to charge one with aggravated murder, the State must demonstrate probable cause that an actor "intentionally *or* knowingly causes the death of another under any of the following circumstances" listed in Utah Code section 76-5-202(1) (emphasis added). Under Utah statute, a person acts intentionally "when it is his conscious objective or desire to engage in the conduct or cause the result."[11] On the other hand, a person acts knowingly "when he is aware of the nature of his conduct or the existing circumstances" and is "aware that his conduct is reasonably certain to cause the result."[12] Thus, "it is certainly possible that a knowing crime can be committed unintentionally."[13] "That is, a person can know that a

[11] Utah Code Ann. § 76-2-103(1) (2005).

[12] *Id.* § 76-2-103(2).

[13] *State v. Casey*, 2003 UT 55, ¶ 37, 82 P.3d 1106.

certain action will cause a certain result without that result being the person's conscious objective."[14]

¶21 The State never conceded a required mens rea of only specific intent. In fact, our research led to ample discourse in the hearing transcripts that indicates that the State focused its analysis on "intentionally" *or* "knowingly," and discounted any requirement of both in order to satisfy the necessary mental state for aggravated murder. In arguing that the State conceded this point, Graham's briefs appear to misrepresent the dialogue between the prosecution and the trial judge at the preliminary hearing. Rather, when the judge repeatedly stated that "an essential element to capital homicide is an intent to kill," the State answered with "Yes. Intentional *or* knowing, yes." (emphasis added). The judge then followed up with "there has to be an intent to kill, not just [] an intent to engage in the conduct but an intent to cause death. Does the State agree with that's [sic] an element of capital homicide?" And the State answered with "Yes, Your Honor. We agree that it has to be intentional or knowingly, yes." We do not interpret the prosecution's responses as a concession that a defendant must act with specific intent – an intentional mental state – to satisfy the requisite mens rea for aggravated murder.

¶22 We believe instead, after careful review of the record, that the prosecution intended to present evidence that if Graham did not act "intentionally," he at a minimum acted "knowingly," and that under our statutory language, either mens rea sufficed to bind Graham over on an aggravated murder charge. Even in those few places in

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[14] *Id.*

the record where the prosecution uses the phrase "intentionally and knowingly," when read in the context of the surrounding statements, it is clear that the State asserts that both mental states are means by which one may be charged with aggravated murder. Accordingly, we disagree with Graham. The State is not precluded from contesting the trial court's conclusions as to the requisite mens rea. The State argued "intentionally or knowingly" at the preliminary hearing and may therefore challenge the trial court's insistence on specific intent.

¶23 Next, we turn to the substance of Graham's argument that despite explicit statutory language, our case law requires the defendant to have acted "intentionally" *and* "knowingly" for the State to charge him with aggravated murder. We disagree. Our case law clearly affirms the language of Utah Code section 76-5-202(1) which expressly provides that "criminal homicide constitutes aggravated murder if the actor *intentionally or knowingly* causes the death of another under *any* of the following circumstances."[15] The statute lists several circumstances, one of which is kidnapping, which elevate criminal homicide to murder.

¶24 Twenty years ago, we addressed this exact question in *State v. Shaffer,* concluding that the argument that first degree murder requires an intentional *and* knowing mental state is "entirely without merit."[16] Instead, "[t]he requisite mental state for first degree murder is 'intentionally *or* knowingly.'"[17] The mental state for

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[15] Utah Code Ann. § 76-5-202(1) (emphasis added).

[16] *State v. Shaffer,* 725 P.2d 1301, 1314 (Utah 1986).

[17] *Id.* (emphasis added).

aggravated murder, Utah's present equivalent to first degree murder,[18] is specified as "intentionally *or* knowingly," and any case law suggesting to the contrary should be disregarded.

¶25 Lastly, we conclude that the prosecution met the bindover standard for aggravated murder because it presented sufficient evidence to reasonably conclude that Graham intentionally or knowingly caused the death of Arnett. Graham crouched at the top of the staircase, knowing that his friend Simmons was holding, with the intent to strike Arnett, an aluminum baseball bat. When Arnett ascended the staircase, Graham met eyes with Simmons, alerting Simmons to the appropriate time to strike Arnett. After Arnett had been hit and was still conscious and mobile, Graham asked Simmons why he "didn't knock him [Arnett] out the first time." Through this statement, Graham indirectly encouraged Simmons to strike Arnett a second time, which Simmons did, knocking Arnett to the ground and into convulsions. Graham assisted in shoving Arnett into a closet, locked it with a deadbolt to which only he and Simmons had the key, and fled the scene of the crime. Finally, Graham had cut the phone lines at the home, making it impossible for the remaining four boys to call for help. Therefore, at the bindover stage, it was reasonable to conclude that Graham understood that this postponement of medical assistance to Arnett, particularly after such a violent beating, could lead with reasonable certainty to Arnett's death.

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[18] *See State v. Holland*, 921 P.2d 430, 437 (Utah 1996) ("[P]leading guilty to first degree murder (now called aggravated murder) does not raise any inference of lack of competency.").

¶26 For the above reasons, it is reasonable to conclude that Graham acted either intentionally or knowingly in causing Arnett's death. The prosecution presented sufficient evidence of an "intentional or knowing" mental state as required by Utah Code section 76-5-202(1). Thus, the trial court erroneously required specific intent.

II. THE STATE DEMONSTRATED KIDNAPPING AS AN AGGRAVATING FACTOR PURSUANT TO UTAH CODE SECTION 76-5-202

¶27 In Utah, criminal homicide constitutes aggravated murder "if the actor intentionally or knowingly causes the death of another . . . [when] the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . aggravated kidnapping [or] kidnapping."[19] Thus, to demonstrate that Graham's kidnapping of Arnett constituted a valid factor for aggravated murder, the State must show that (1) Graham satisfied the requisite mental state for aggravated murder, (2) his actions constituted kidnapping under Utah Code section 76-5-301, and (3) the homicide occurred "while" Graham was engaged in the kidnapping pursuant to section 76-5-202(1)(d). We have addressed the requisite mental state and have concluded that the State met its burden for a bindover. Therefore, we turn to whether Arnett's actions constituted kidnapping under Utah Code section 76-5-201, and if so, whether the homicide occurred "while" Graham was engaged in the commission of the kidnapping.

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[19] Utah Code Ann. § 76-5-202(1)(d) (2005).

A. Graham's Actions Constituted Kidnapping under Utah Code Section 76-5-301

¶28 Utah Code section 76-5-301 provides that

> (1) An actor commits kidnapping if the actor intentionally or knowingly, without authority of law, and against the will of the victim: (a) detains or restrains the victim for any substantial period of time; (b) detains or restrains the victim in circumstances exposing the victim to risk of bodily injury; [or] (c) holds the victim in involuntary servitude. . . .

To demonstrate sufficient evidence of kidnapping in this case, the State must show that one could reasonably conclude that Graham, against the will of Arnett, detained or restrained him for any substantial period of time or detained him in circumstances exposing him to risk of bodily injury.

¶29 The evidence shows that in locking Arnett in a closet and in taking the only key to that closet's deadbolt lock, Graham detained and restrained Arnett for a substantial period of time. The fact that Graham and Simmons took the deadbolt's key and cut the phone lines added considerable length to Arnett's detainment because, as previously discussed, two of the remaining boys had to run over two miles for help before another counselor freed Arnett from the closet and called the paramedics.

¶30 Moreover, the manner in which Graham placed Arnett in the closet arguably demonstrates a detainment in circumstances exposing Arnett to risk of bodily injury. Placing him upside down on his head, the exact location of the two violent blows, Graham may have put Arnett in even greater physical danger and risk of more extensive

injury than already sustained. Each of these factors, alone, and certainly together, presents sufficient evidence to bind Graham over for kidnapping Arnett. Thus, we affirm the lower court's bindover on the charge of kidnapping.

B. Graham Committed the Homicide while in the Commission of the Kidnapping Pursuant to Utah Code Section 76-5-202(1)(d)

¶31 The critical question is whether Graham committed this homicide *while* in the commission of the kidnapping as required by Utah Code section 76-5-202(1)(d).[20] Reasoning that because the acts which caused the homicide – the two blows to the head – occurred before the kidnapping, the trial court quashed the statutory murder aggravator on the ground that Arnett's death "did not occur *while* [Graham] *was engaged* in the commission of, or an attempt to commit, or flight after committing or attempting to commit kidnapping or aggravated kidnapping." We respectfully disagree with the trial court's reasoning. As long as the acts that constitute kidnapping occurred at or about the same time as the blows to the head and prior to Arnett's death, as part of one continuous criminal event, the homicide occurred while Graham was engaged in the commission of the kidnapping.

[20] "(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances . . . (d) the homicide was committed *while* the actor was engaged in the commission of, or an attempt to commit . . . kidnapping." Utah Code Ann. § 76-5-202(1)(d) (emphasis added).

¶32 Contrary to Graham's contention, our case law does not require a "time sequence" under which the felony has already been in progress before any of the acts resulting in homicide have been committed. Graham argues that because the first step in the homicide – arguably the first blow to the head – occurred prior to the time of the kidnapping, the homicide did not occur "while" Graham was engaged in the kidnapping. We disagree.[21]

¶33 Our case law focuses on "whether the death and the aggravating acts constituted a 'continuity of action over a span of time.'"[22] In *State v. Johnson,*[23] we defined "while" as "during the time that,"[24] which "clearly implies a continuity of action over a span of time."[25] We also explained that "the term 'while' does not indicate . . . that the killing must occur at the same instant as the [kidnapping] . . . , but rather indicates that the killing must be directly

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[21] Instead, we conclude that it is only logical that a homicide is not completed until the victim dies. Homicide is defined as "intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, caus[ing] the *death* of another human being." *Id.* § 76-5-201(1)(a) (emphasis added). Even if the two blows to the head started the events which resulted in the homicide, the "homicide" was not complete until the victim actually died.

[22] *State v. Archuleta,* 850 P.2d 1232, 1245 (Utah 1993) (quoting *State v. Johnson,* 740 P.2d 1264, 1268 (Utah 1987)).

[23] 740 P.2d 1264 (Utah 1987).

[24] *Id.* at 1268. In *State v. Johnson,* we relied on the definition of "while" given by the Indiana Supreme Court in *Stroud v. State,* 395 N.E.2d 770, 771 (Ind. 1979). Although *Stroud* dealt specifically with Indiana's death penalty statute, we find the analysis and definitions relevant and appropriate for interpreting Utah Code section 76-5-202(1)(d).

[25] *Johnson,* 740 P.2d at 1268.

associated with the [kidnapping] as part of one continuous occurrence, a situation present in the instant case."[26]

¶34 A few years later in *State v. Archuleta,* we affirmed the reasoning in *Johnson,* relying on the same definition of "while."[27] In *Archuleta,* the defendant argued that if any of the criminal acts inflicted on the victim were completed before the intent to commit the homicide was formed, then those offenses cannot be aggravating circumstances.[28] We disagreed and held that as long as there is "no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction."[29]

¶35 Graham relies on this statement in *Archuleta* to support his assertion that the kidnapping had to begin before the homicide in order for his acts to constitute aggravated murder. That is not correct. The law, as described in *Johnson* and *Archuleta,* is that if the felony and homicide are closely related in time and proximity, it is logical to consider them as one continuous transaction, and a defendant may be charged with each separate crime committed during that transaction so long as the requisite independent elements are satisfied.

¶36 In this case, Graham started the chain of events by encouraging Simmons to hit Arnett with the bat. The homicide was not complete, however, until Arnett actually died. Therefore, Graham may be charged with

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[26] *Id.*

[27] 850 P.2d 1232 (Utah 1993).

[28] *Id.* at 1244-45.

[29] *Id.*

any independent crime committed between the first blow and Arnett's death, so long as the independent crime was part of one continuous chain of events with the beating. Here, the blows and the detainment in the closet occurred mere moments apart in the chain of events leading to Graham's escape from the Academy. Therefore, it is reasonable to conclude that the homicide occurred while Graham engaged in the kidnapping. And because kidnapping falls under those crimes listed as aggravating factors, the State may prosecute Graham for aggravated murder.

¶37 Finally, Graham argues that the kidnapping could not have been committed "while" he was engaged in the commission of the homicide because the mens rea required for kidnapping conflicted with the mens rea required for homicide. This contention is without merit. Both aggravated murder and kidnapping require the same mens reas: an "intentionally or knowingly" mental state.[30] The State provided sufficient evidence both that Graham "intentionally or knowingly" murdered Arnett and that Graham "intentionally or knowingly" detained and restrained him in the closet. Graham's actions satisfied the elements of these two separate acts, coupled with their corresponding requisite mental states, and are thus sufficient to support both charges.

¶38 In sum, the State presented sufficient evidence to permit application of kidnapping as an aggravating factor pursuant to Utah Code section 76-5-202(1)(d). The mens reas for kidnapping and for aggravated murder are the same, and Graham's actions reasonably satisfied both crimes independent from each other. And because the

[30] Utah Code Ann. § 76-5-202(1), -301(1).

homicide occurred while in the commission of the kidnapping, Graham should have been bound over for aggravated murder.

III. THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE DEMONSTRATED INSUFFICIENT EVIDENCE FOR AN ALTERNATIVE CHARGE OF FELONY MURDER

¶39 We also granted review to determine whether the State demonstrated that the homicide was accomplished in the course of committing the kidnapping as a predicate offense pursuant to Utah Code section 76-5-203(2)(d) (2005), which provides that

> (2) Criminal homicide constitutes murder if:
>
> . . . .
>
> (d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense.

Under subsection (1), the statute lists the "predicate offenses," which in this particular case include kidnapping.[31] The State argues that the trial court erred in refusing to bind Graham over under the section 76-5-203(2)(d) felony murder rule as an alternative to aggravated murder. We agree.

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[31] Utah Code Ann. § 76-5-203(1) (2005).

¶40 The trial court erroneously concluded that the homicide did not occur "in the commission, attempted commission, or immediate flight from the commission or attempted commission of the predicate offense."[32] The language of both the aggravated murder statute of section 76-5-202(1)(d) and the felony murder statute of section 76-5-203 leads us to the same textual and legal analysis. First, the phrases "while the actor is engaged in" from the aggravated murder statute and "the actor is engaged in the commission of" from the felony murder statute share the same meaning. Because they are essentially synonymous, we also apply the *Johnson* and *Archuleta* analysis to the phrase "engaged in the commission of." Thus, we conclude that the homicide and kidnapping at issue in this case were likewise inextricably intertwined to represent "a continuity of action over a span of time."[33]

¶41 As a result, we hold that because the State demonstrated sufficient probable cause that the homicide was accomplished in the course of committing the kidnapping as a predicate offense pursuant to section 76-5-203(2)(d), in the alternative to aggravated murder, the trial court at least should have bound Graham over on the charge of felony murder.

IV. THE ISSUES RAISED CONCERNING UTAH CODE SECTION 76-5-202(1)(F) ARE MOOT BECAUSE THE STATE HAS DROPPED THE CHARGE

¶42 It is unnecessary for us to address whether Graham's departure from the group home may be construed

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[32] *Id.* § 76-5-203(2)(d)(i).

[33] *State v. Archuleta*, 850 P.2d 1232, 1245 (Utah 1993).

as "pecuniary or other personal gain" under Utah Code section 76-5-202(1)(f) (2005) because the State withdrew it as an aggravating factor. Consequently, we need not address whether that section is unconstitutionally vague or overbroad.

CONCLUSION

¶43 Graham's actions constituted the elements of both kidnapping and aggravated murder independently of one another. The State satisfied the appropriate mental state for aggravated murder by demonstrating that Graham "intentionally or knowingly" committed the homicide. The State presented sufficient evidence, pursuant to our aggravated murder statute, to reasonably conclude that Graham committed the homicide while "engaged in the commission of" the kidnapping. Likewise, the State demonstrated sufficient evidence to reasonably conclude, in the alternative to aggravated murder, that Graham committed felony murder. We accordingly reverse in part and affirm in part the orders of bindover and remand for further proceedings consistent with the law as expressed herein.

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¶44 Chief Justice Durham, Justice Durrant, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Wilkins' opinion.

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IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH Plaintiff, vs. SEAN GRAHAM, Defendant.	FINDINGS OF FACT AND ORDER GRANTING DEFENDANT SEAN GRAHAM'S MOTION TO QUASH AMENDED INFORMATION; AND BIND-OVER ORDER (Filed Dec. 28, 2004) Criminal No. 041500145 Judge: G. Michael Westfall

On May 24, 2004, a preliminary hearing commenced in the above-entitled matter. On June 9, 2004, the preliminary hearing was concluded. After the preliminary hearing was completed, an Amended Information was filed. On September 16, 2004, Defendant SEAN GRAHAM filed a Motion to Quash Amended Information.

On November 15, 2004, the above-entitled matter came on regularly for hearing on Defendant SEAN GRAHAM'S Motion to Quash Amended Information. The Honorable G. Michael Westfall, Judge, presided over the proceedings. The court reviewed the evidence presented at the preliminary hearing. Both the defense and the prosecution submitted legal memorandum in support of their respective positions and the matter was orally argued. The matter having been submitted, the court enters the following findings of fact, grants the motion to quash the amended information, and issues a bind-over order as follows:

FINDINGS OF FACT

1. In order for Defendant SEAN GRAHAM to be bound over for capital murder, the State must prove that Defendant SEAN GRAHAM had the specific intent to kill Anson Arnett. The degree of Defendant SEAN GRAHAM'S criminal responsibility is determined by his own mental state *not* by the mental state of Defendant JESSE SIMMONS.

2. The prosecution did *not* present sufficient evidence at the preliminary hearing for the court to find [probable cause to believe] that Defendant SEAN GRAHAM had the specific intent to cause the death of Anson Arnett. The court finds that the use of a baseball bat by Defendant JESSE SIMMONS to commit the homicide is *not* sufficient to [sustain a finding of probable cause to believe] ~~prove~~ that Defendant SEAN GRAHAM had the specific intent to cause the death of Anson Arnett. The court finds that a baseball bat is *not* an inherently dangerous weapon. The court further finds that although Anson Arnett was struck twice with the baseball bat, the two

blows were not struck in a repeated or rapid succession. The court also finds that after the blow was struck that rendered Anson Arnett incapacitated, the defendant did not engage in any further activity to ensure the death of Anson Arnett. Finally, the court finds that Kevin Satchell testified at the preliminary hearing that Defendant SEAN GRAHAM made a statement during the incident, to wit, "Why didn't you knock him out the first time?" or something like that. The court finds that this statement is evidence of Defendant Sean Graham's mental state. The court finds that this statement is only susceptible to one reasonable inference, which is that Defendant SEAN GRAHAM did *not* have the specific intent to cause the death of Anson Arnett. Therefore, the court finds that [there was insufficient evidence presented at the preliminary hearing to sustain a finding that there was probable cause to believe that the] Defendant SEAN GRAHAM ~~did~~ not intentionally or knowingly caused the death of Anson Arnett within the meaning of U.C.A. § 76-5-202(1).

3. The court finds that the State presented sufficient evidence at the preliminary hearing for the court to find probable cause to believe that Defendant SEAN GRAHAM committed the crimes of kidnapping and aggravated kidnapping pursuant to U.C.A. §§ 76-5-301 and 76-5-302. The court finds that Anson Arnett was knocked unconscious by his having been struck in the head with a baseball bat by Defendant JESSE SIMMONS. The court further finds that Defendant SEAN GRAHAM and Defendant JESSEE [sic] SIMMONS placed Anson Arnett in a closet after he was knocked unconscious. The court further finds that Anson Arnett was still alive at the time he was placed in the closet. The court finds that the death of Anson

Arnett was caused by his being struck in the head with a baseball bat by Defendant JESSE SIMONS [sic].

4. The court finds that the death of Anson Arnett did *not* occur *while* Defendant SEAN GRAHAM *was engaged in* the commission of, or an attempt to commit, or flight after committing or attempting to commit kidnapping or aggravated kidnapping. The court finds that the use of the language "while" and "engaged in" as set forth in U.C.A. § 76-5-202(1)(d), require that the death of the victim occur during the course of a kidnapping or aggravated kidnapping. The court also finds that the acts of Defendant SEAN GRAHAM that give rise to charges of kidnapping (U.C.A. § 76-5-301) and/or aggravated kidnapping (U.C.A. § 76-5-302) did *not* occur until after the victim was incapacitated. The prosecution did not present any evidence from which the court could find that Defendant SEAN GRAHAM had the intent to kidnap Anson Arnett until after he was incapacitated. Further, neither a kidnapping nor an aggravated kidnapping were in progress when the act that caused the homicide was committed. Hence, the death of Anson Arnett did *not* occur *while* Defendant SEAN GRAHAM was *engaged in* a kidnapping or aggravated kidnapping. Therefore, the court finds that the prosecution did *not* present sufficient evidence at the preliminary hearing for the court to find that the death of Anson Arnett was committed *while* Defendant SEAN GRAHAM *was engaged in* the commission of, or an attempt to commit, or flight after committing or attempting to commit kidnapping or aggravated kidnapping within the meaning of U.C.A. § 76-5-202(1)(d).

5. The court finds that the prosecution presented sufficient evidence for the court to find probable cause to believe that Defendant SEAN GRAHAM committed a

homicide for "other personal gain" within the meaning of U.C.A. § 76-5-202(1)(f). The court finds that the "other personal gain" in this case is that Defendant SEAN GRAHAM was able to leave from the facility where he did not want to be.

6. The court finds that U.C.A. § 76-5-202(1)(f) is *not* unconstitutionally vague or overbroad.

7. The court finds that the prosecution presented sufficient evidence at the preliminary hearing for the court to find probable cause to believe that Defendant SEAN GRAHAM committed the crime of murder pursuant to U.C.A. § 76-5-203, subdivisions (2)(b) and (2)(c), because he:

a. intended to cause serious bodily injury while acting as an accomplice to an act that was clearly dangerous to human life, which caused the death of Anson Arnett; and,

b. acted under circumstances evidencing a depraved indifference to human life, by acting as an accomplice to conduct which created a grave risk of death to Anson Arnett and thereby caused the death of Anson Arnett.

8. The court finds that the prosecution did *not* present sufficient evidence at the preliminary hearing for Defendant SEAN GRAHAM to be bound over for murder pursuant to U.C.A. § 76-5-203, subdivision (d), because Anson Arnett was not killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of the predicate offense, to wit, kidnapping or aggravated kidnapping.

RULING ON MOTION TO QUASH

As to Defendant SEAN GRAHAM, the court hereby orders that:

1. The bind-over order is quashed as to the crime of aggravated murder because:

a. [The evidence did *not* support a finding of probable cause to believe that Defendant SEAN GRAHAM did ~~not~~ have the specific intent to kill Anson Arnett within the meaning of U.C.A. § 76-5-202(1); and,

b. the death of Anson Arnett did *not* occur *while* Defendant SEAN GRAHAM *was engaged in* the commission of, or an attempt to commit, or flight after committing or attempting to commit kidnapping or aggravated kidnapping within the meaning of U.C.A. § 76-5-202(1)(d).

2. Defendant SEAN GRAHAM is bound over for trial on the following charges:

a. the murder of Anson Arnett pursuant to U.C.A. § 76-5-203, subdivision (2)(b), because there is probable cause to believe that Defendant SEAN GRAHAM intended to cause serious bodily injury while acting as an accomplice to an act that was clearly dangerous to human life, which caused the death of Anson Arnett;

b. the murder of Anson Arnett pursuant to U.C.A. § 76-5-203, subdivision (2)(c), because there is probable cause to believe that Defendant SEAN GRAHAM acted under circumstances evidencing a depraved indifference to human life, by acting as an accomplice to

conduct which created a grave risk of death to Anson Arnett and thereby caused the death of Anson Arnett;

c. the kidnapping of Anson Arnett pursuant to U.C.A. § 76-5-301;

d. the aggravated kidnapping of Anson Arnett pursuant to U.C.A. § 76-5-302;

e. theft of an operable motor vehicle pursuant to U.C.A. § 76-6-412; and,

f. theft pursuant to U.C.A. § 76-4-404;

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the County Attorney file a Second Amended Information in accord with this bind over order.

DATED this 28th day of December, 2004.

BY THE COURT:

[seal] /s/ [Illegible]
Honorable G. Michael Westfall
District Court Judge

Approved as to form and content by:

/s/ S. Garrett
Scott Garrett, Iron County Attorney

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, PLAINTIFF/APPELLANT-CROSS APPELLEE, VS. SEAN GRAHAM, DEFENDANT/APPELLEE-CROSS APPELLANT.	)	CASE NO. 20050046-SC

TRANSCRIPT OF AUDIO RECORDING
OF COURT PROCEEDINGS

FROM APRIL 5, 2006.

* * *

[2] (ELLIPSES, I.E. . . . , INDICATE PORTIONS OF RECORDING THAT ARE INAUDIBLE OR UNINTELLIGIBLE.)

(SPEAKER IDENTIFICATION MAY NOT BE ACCURATE.)

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CHIEF JUSTICE DURHAM: . . . ON BEHALF OF APPELLANT AND CROSS APPELLEE.

MS. DUPAIX: STATE'S PETITION RAISES THREE QUESTIONS. UM, THE DEFENDANT RAISES ONE AND I WILL ADDRESS HIS IN MY REBUTTAL TIME.

THE THREE QUESTIONS THAT THE STATE RAISES ARE THESE. FIRST: IS THERE SUFFICIENT PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT, AS AN ACCOMPLICE, INTENTIONALLY OR

KNOWINGLY CAUSED THE DEATH OF ANSON ARNETT. ASSUMING THAT THE ANSWER TO THAT IS YES, THE NEXT QUESTION WILL BE: MAY THE AGGRAVATED KIDNAPPING THAT THE DEFENDANT ENGAGED IN IN THIS CASE BE USED TO AGGRAVATE THE MURDER. AND THEN, ASSUMING THAT THE ANSWER TO BOTH QUESTIONS MIGHT BE NO, THE STATE NEVERTHELESS WANTS TO KNOW WHETHER IT MAY PROCEED ON A THEORY OF FELONY MURDER ALONG WITH THE TWO OTHER VARIATIONS OF MURDER BOUND OVER BY THE TRIAL COURT.

I'LL BEGIN WITH THE FIRST AND WE'LL TREAT THE SECOND AND THIRD ISSUES TOGETHER BECAUSE I THINK, ANALYTICALLY, THEY'RE VERY CLOSELY RELATED. WITH RESPECT TO THE MURDER, NO ONE INCLUDING THE DEFENDANT DISPUTES THAT HE CAUSED THE DEATH OF ANSON ARNETT. THIS DISPUTE CENTERS [3] ONLY ON HIS MENTAL STATE. SO THE QUESTION IS – WAS WHETHER – WAS THERE ENOUGH EVIDENCE AT PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE OR GIVE RISE TO A REASONABLE BELIEF THAT THE DEFENDANT INTENTIONALLY OR KNOWINGLY CAUSED ANSON ARNETT'S DEATH.

THE TRIAL COURT, WE THINK, LEGALLY ERRED ON THIS QUESTION. FIRST OF ALL, BECAUSE HE ASSUMED THAT THE STATE HAD TO PROVE AN INTENTIONAL MURDER, NAMELY, THAT THE DEFENDANT HAD TO HAVE, AS HIS CONSCIOUS OBJECTIVE, ANSON ARNETT'S DEATH. WE THINK, UNDER THE PLAIN LANGUAGE OF THE STATUTE AND UNDER CASEY, THAT THERE'S NO QUESTION

THAT THE STATE DID NOT HAVE TO PROVE BOTH AN INTENTIONAL AND KNOWING MENS REA, OR MENTAL STATE. THE STATE ONLY HAD TO PROVE EITHER KNOWINGLY OR INTENTIONALLY. WHILE WE THINK THE EVIDENCE IS SUFFICIENT ON BOTH, WE THINK LEGALLY IT'S CLEAR THAT WE ONLY HAD TO PROVE ONE OR THE OTHER. AND, UM, UNLESS THE COURT HAS ANY QUESTIONS OR CONCERNS ABOUT THAT, I'D LIKE TO JUST LEAVE THAT LEGAL ISSUE BASED ON WHAT I'VE WRITTEN IN MY BRIEF. BECAUSE I REALLY THINK CASEY IS DISPOSITIVE OF THAT POINT.

UNIDENTIFIED JUSTICE: I DO HAVE ONE QUESTION IN THAT REGARD. WHAT – WHAT DO YOU UNDERSTAND TO BE THE DIFFERENCE BETWEEN INTENT AND SPECIFIC INTENT, IF ANY?

MS. DUPAIX: YOU KNOW, I – I WAS THINKING ABOUT THAT TODAY AND, IN FACT, JUSTICE STEWART TALKED ABOUT THAT [4] IN HIS DECISION IN STANDIFORD AND HE POINTS OUT THAT SPECIFIC INTENT IS USED IN A COUPLE OF WAYS. AND THE MODEL PENAL CODE HAS REALLY EJECT – REJECTED ONE OF THE TRADITIONAL WAYS THAT WE USE IT, WHICH IS A SPECIFIC INTENT TO CAUSE A SPECIFIC RESULT. AND I THINK THAT'S HOW THE TRIAL COURT USED IT IN THIS CASE.

BUT JUSTICE STEWART ALSO POINTED OUT THAT, UM, THE FOUR VARIATIONS OF MURDER, UM, INTENTIONAL OR KNOWING, INTENT TO CAUSE SERIOUS BODILY INJURY, DEPRAVED INDIFFERENCE, UM, ALL HAD A SIMILAR MENS REA THAT ESSENTIALLY THEY AMOUNTED TO INTENT. AND

HE OPTED TO USE THE TERM SPECIFIC INTENT WHEN REFERRING TO THOSE CATEGORIES OF INTENT. UM, SO SPECIFIC INTENT CAN BE USED WHEN REFERRING TO A SPECIFIC CATEGORY OF INTENT AND IN THIS CASE THE SPECIFIC INTENT OF THE STATUTE IS INTENTIONAL OR KNOWING. BUT, I THINK THE TRIAL COURT IN THIS CASE PRETTY CLEARLY USED THIS TO MEAN THAT THE DEFENDANT HAD TO HAVE AS HIS CONSCIOUS OBJECTIVE, THE DEATH OF ANSON ARNETT. SO IN THIS CASE, WHEN WE TALK ABOUT SPECIFIC INTENT AND HOW THE TRIAL COURT USED IT, I THINK THAT'S HOW IT'S BEING USED.

OKAY. THE QUESTION THEN IS: WHAT DO WE HAVE AT THE PRELIMINARY HEARING THAT GIVES RISE TO EITHER AN INTENTIONAL OR KNOWING MENTAL STATE BY THE DEFENDANT. UM, JUST BRIEFLY, FIRST OF ALL I THINK ITS VERY CLEAR ON THIS RECORD THAT THE DEFENDANT INTENTIONALLY AIDED SIMMONS IN [5] HITTING ARNETT WITH A BASEBALL BAT. THERE WERE THE EYE SIGNALS, THERE WAS THE PLAN BEFORE, THEY HAD HID THE BASEBALL BAT, HE CLEARLY KNEW ABOUT THE BASEBALL BAT. WHEN THE VICTIM FELL CONVULSING TO THE FLOOR, NEITHER DEFENDANT PANICKED. THEY KEPT THEIR COOL AND WITHOUT MISSING A BEAT THEY PICKED UP OR FRISKED ARNETT AND TOOK HIS KEYS, WHICH GO TO EVERY DOOR IN THE HOUSE AND THE VAN. THEY UNLOCKED THE NEARBY CLOSET DOOR. THEY THEN IMMEDIATELY PUT THE – THE VICTIM UPSIDE DOWN IN THAT DOOR AND STOOD HIM ON HIS INJURED HEAD; ALTHOUGH, HE WAS A LITTLE

BIT ON HIS NECK BUT, ESSENTIALLY, HE'S UPSIDE DOWN AND THEY KNOW HE'S BEEN SEVERELY INJURED BECAUSE OF THE CONVULSIONS. THEY LOCK THE CLOSET DOOR, CUT THE PHONE LINES, UM, HAVE THE PRESENCE OF MIND TO TAKE THE T.V. AND THE MEDICINE BOX. THEY – THEY THEN TAKE THE KEYS AND FLEE IN THE VAN TO LAS VEGAS.

TAKEN TOGETHER, THESE REASONABLE INFERENCES TELL US THAT THE DEFENDANT EITHER INTENDED THAT THE VICTIM DIE; ALTHOUGH, ADMITTEDLY, I THINK THAT INFERENCE IS WEAKER THAN ON THE KNOWING MENTAL STATE. BUT TO NOT BIND OVER IN THIS CASE, THE TRIAL COURT HAD TO FIND THAT IT WAS UNREASONABLE TO BELIEVE THAT – UNDER THESE FACTS, THAT THE DEFENDANT WAS UNAWARE – OR AWARE THAT HIS CONDUCT TAKEN TOGETHER WAS REASONABLY CERTAIN TO CAUSE ARNETT'S DEATH.

NOW, GRANTED, I THINK THERE ARE SOME COMPETING INFERENCES THAT COULD BE DRAWN FROM SOME OF THE FACTS IN [6] THIS CASE THAT WILL CUT THE OTHER WAY. BUT UNDER A BIND-OVER STANDARD, WE LET THE JURY RESOLVE THOSE COMPETING INFERENCES. THERE HAS TO BE A COMPLETE ABSENCE OF ANY PROOF OR REASONABLE INFERENCES BEFORE WE WON'T GIVE IT TO THE JURY. AND – AND JUST QUICKLY, LET ME POINT OUT THAT I THINK IT'S COMMON KNOWLEDGE THAT A BASEBALL BAT CAN BE, AND IS OFTEN USED AS A DANGEROUS WEAPON. THAT'S WHY BASEBALL CATCHERS WEAR HELMETS; SO THEY DON'T GET HIT IN THE HEAD WITH A BASEBALL

BAT. IN FACT, I THINK THIS POINT IS SO COMMONLY KNOWN, IT'S PERVASIVE IN OUR POP CULTURE. T.V.'S AND MOVIES ABOUT MAFIA AND GANG MEMBERS SHOW THIS. IN FACT, EVEN SOME SCI-FI MOVIES LIKE "SIGNS," UM, THEY USE A BASEBALL BAT TO KILL THE ALIEN.

UNIDENTIFIED JUSTICE: BUT IF GRAHAM HAD THOUGHT THIS BLOW THAT SIMMONS IS GOING TO STRIKE MAY CAUSE THE DEATH OF MR. ARNETT, THAT WOULD BE INADEQUATE TO SATISFY A KNOWING STANDARD; CORRECT?

MS. DUPAIX: IT MIGHT BE. BUT I THINK UNDER ALL THE CIRCUMSTANCES, YOU CAN INFER THAT HE WAS AWARE THAT ALL OF HIS CONDUCT TAKEN TOGETHER – THERE – THE BLOWS WITH THE BASEBALL BAT – AND THE TRIAL COURT SORT OF GLOMMED ONTO THE STATEMENT THAT THE DEFENDANT MADE BETWEEN THE BLOWS TO THE HEAD, UM, AND BELIEVE THAT THIS NEGATED ANY IDEA THAT HE KNEW. BUT I THINK ONCE HE MAKES THAT STATEMENT, THAT'S A REASONABLE INFERENCE. BUT THE OTHER [7] INFERENCE IS – IS THAT HE'S ENCOURAGING AND HE'S UPSET THAT SIMMONS HASN'T HIT HIM HARD ENOUGH TO COMPLETELY KNOCK HIM OUT. AND THEN, WHEN THEY SEE HIM CONVULSING, INSTEAD OF LEAVING HIM WHERE HE IS, THEY STAND HIM UPSIDE DOWN IN THE CLOSET AND LOCK THE DOOR. THEY – STANDING HIM UPSIDE DOWN IN A CLOSET, IT SEEMS A REASONABLE PERSON WOULD BELIEVE OR BE AWARE THAT THIS IS LIKELY TO EXACERBATE THE SERIOUS HEAD INJURY THAT THEY'VE INFLICTED. AND THEN TAKING THE KEYS AND

CUTTING THE PHONE LINES, THEY'VE INSURED THAT HE'S NOT GOING TO GET HELP. NOW HE CAN ARGUE TO THE JURY THAT HE WAS –

UNIDENTIFIED JUSTICE: IT'S – IT'S NOT LIKELY TO CAUSE DEATH THOUGH; RIGHT? I MEAN, IT'S – THE MENTAL STATE HAS TO BE THAT HE IS REAS – HE – HE – HE – HE'S AWARE THAT, WELL THERE'S – THAT THERE'S REASONABLE CERTAINTY THAT IT WILL CAUSE DEATH.

MS. DUPAIX: THAT HE'S AWARE THAT HIS CONDUCT –

UNIDENTIFIED JUSTICE: HIS CONDUCT –

MS. DUPAIX: – YES.

UNIDENTIFIED JUSTICE: – WITH REASONABLE CERTAINTY WILL CAUSE DEATH.

MS. DUPAIX: HE CAN ARGUE TO THE JURY, I BELIEVE, THAT HE WAS NOT REASONABLY CERTAIN OF THAT, OR HE WAS NOT AWARE THAT HIS CONDUCT WAS REASONABLY CERTAIN. BUT I THINK THE JURY HAS THE OPTION OF DISBELIEVING THAT ARGUMENT AND [8] TAKING ALL THE FACTS TOGETHER. AND LET ME POINT OUT THAT UNDER THE BIND OVER WE ASSUME THAT THE PROSECUTION'S CASE IS GOING TO BE STRENGTHENED. AND SO WE CAN'T ASSUME THAT THIS IS GOING TO BE THE ONLY EVIDENCE THE JURY WILL HEAR. WE'RE ONLY CONCERNED ABOUT FERRETING OUT MERITLESS PROSECUTIONS. AND THIS IS NOT A MERITLESS PROSECUTION, BECAUSE WE KNOW HE CAUSED THE DEATH. THE ONLY QUESTION HERE GOES TO – TO INTENT AND

OUR POSITION IS – IS IF THERE'S ANY EVIDENCE THAT WOULD ALLOW ANY REASONABLE INFERENCE THAT HE MIGHT HAVE BEEN AWARE, THEN THIS IS A JURY QUESTION AND THE JURY GETS TO RESOLVE IT.

JUSTICE PARRISH: NOW THERE'S NO EVIDENCE, AS I UNDERSTAND IT, THAT LOCKING HIM IN THE CLOSET WITHOUT MEDICAL TREATMENT FOR TWO HOURS ACTUALLY CONTRIBUTED TO HIS DEATH. IS THAT TRUE? AND DOES THAT MEAN THEN THAT WE CAN'T CONSIDER THOSE CIRCUMSTANCES AS THEY MIGHT BEAR UPON THE INTENT HE HAD AT THE TIME THE LETHAL BLOWS WERE INFLICTED?

MS. DUPAIX: OKAY. IT'S TRUE THAT THERE WAS NO EVIDENCE PRESENTED AT THE PRELIMINARY HEARING THAT THAT CONTRIBUTED TO HIS DEATH. BUT, I DON'T THINK THAT PRECLUDES THE MAGISTRATE OR EVEN A JURY REALLY, ALTHOUGH THERE MAY BE EVIDENCE OF THAT IN A JURY TRIAL. FROM – CONSIDERING THAT WHEN YOU'RE CONSIDERING WHAT CIRCUMSTANCES IS HE AWARE OF. A LOT OF THIS IS COMMON SENSE. IT'S LIKE [9] THE BASEBALL BAT. IT'S A DANGEROUS WEAPON AND PEOPLE GENERALLY KNOW THAT. THAT IF YOU BASH SOMEBODY IN THE – IN THE HEAD WITH A BASEBALL BAT, IT'S LIKELY TO KILL THEM. UM, STANDING THEM UPSIDE DOWN ON THEIR HEAD IN CRAMPED QUARTERS –

CHIEF JUSTICE DURHAM: WELL LET – LET ME INTERVENE ON THAT BECAUSE YOU'VE USED THAT – THAT CHARACTERIZATION SEVERAL TIMES

AND IT – IT WASN'T CLEAR TO ME FROM READING THE RECORD – THE – THE DEFENDANT'S BRIEFS CHARACTERIZE IT OTHERWISE AS HAVING DRAGGED THE DEFENDANT (SIC) INTO A CLOSET WHERE THERE WASN'T ROOM FOR HIS LEGS AND DRAPED HIS LEGS OVER A FILING CABINET THAT WAS TAKING UP THE ROOM IN THE CLOSET. IS THERE EVIDENCE THAT THEY PICKED HIM UP BY HIS FEET AND DEPOSITED HIM HEAD – HIM HEAD-FIRST?

MS. DUPAIX: WELL, I THINK THEY HAD TO IN ORDER TO DO THAT, BECAUSE THERE WAS A FILING CABINET IN THE CLOSET. UM, BUT I DON'T THINK IT MATTERS FOR PURPOSES OF THIS. THE FACT IS – IS THAT THEY PLACED HIM IN THE CLOSET THAT WAY. AND I THINK IT'S REASONABLE –

CHIEF JUSTICE DURHAM: WELL, BUT IT WAS THE ONLY WAY TO PLACE HIM IN THE CLOSET, APPARENTLY, BECAUSE OF THE ROOM IN THE CLOSET.

MS. DUPAIX: SURE, BUT WHEN YOU'RE TALKING ABOUT WHAT HE'S AWARE OF AND WHETHER THAT CONDUCT – HE DIDN'T [10] HAVE TO PLACE HIM IN THE CLOSET.

CHIEF JUSTICE DURHAM: RIGHT. I KNOW. I JUST THINK –

MS. DUPAIX: YEAH.

CHIEF JUSTICE DURHAM: – REFERRING TO IT AS, "STANDING HIM ON HIS HEAD IN THE CLOSET" MIGHT BE STRETCHING IT A LITTLE BIT.

MS. DUPAIX: THE EFFECT IS – IS HE WAS STOOD ON HIS HEAD IN THE – IN THE CLOSET. ALTHOUGH IT – FROM WHAT – HOW I READ THE RECORD, AND IT'S HARD TO PICTURE, HIS HEAD IS – IS IN THE CORNER OF THE CLOSET AND HIS NECK IS SORT OF KINKED DOWN. BUT MY POINT IS – IS WHEN YOU'VE INFLICTED A HEAD INJURY ON THAT, I THINK IT'S –

CHIEF JUSTICE DURHAM: WELL IT WASN'T – IT – THERE'S NO QUESTION IT WAS NOT – NOT . . .

MS. DUPAIX: YEAH. IT'S NOT A GOOD IDEA TO –

CHIEF JUSTICE DURHAM: – NOT A GOOD IDEA. NO.

MS. DUPAIX: – WITH THE BLOOD – RUSHES TO THE HEAD. AND THAT'S REALLY MY POINT ON THAT.

CHIEF JUSTICE DURHAM: OKAY.

MS. DUPAIX: SO YOU CAN INFER THAT OR CONSIDER THAT IN – UM, IN CONSIDERING WHAT HE WAS AWARE OF, IN TERMS OF WHETHER OR NOT HE KNEW THAT THAT CONDUCT WAS REASONABLY CERTAIN TO RESULT IN DEATH.

UM, I'VE RESERVED TEN MINUTES OF MY TIME, AND I [11] SEE THAT IT'S GONE, BUT I WANT TO TAKE JUST A FEW MORE MINUTES, SO IF YOU CAN CUT THAT AGAINST MY REBUTTAL TIME I'D APPRECIATE IT, UM, JUST TO TALK ABOUT THE KIDNAPPING AGGRAVATOR. UM, THIS – THIS REALLY TURNS ON THE STATUTORY LANGUAGE AND WHAT

THE LEGISLATURE INTENDED. THE STATUTORY LANGUAGE IS – IS THAT, "THE HOMICIDE WAS COMMITTED WHILE ENGAGED IN THE COMMISSION, ATTEMPTED COMMISSION, OR FLIGHT FROM A SPECIFIED FELONY," WHICH IN THIS CASE IS A KIDNAPPING OR AGGRAVATED KIDNAPPING, CONSISTENT WITH THE MEANING OF "WHILE" WHEN USED AS A CONJUNCTION. DURING – IT MEANS, "DURING THE TIME THAT OR AS LONG AS." "DURING" MEANS, "THROUGHOUT THE CONTINUANCE OR COURSE OF OR AT SOME POINT IN THE COURSE OF."

NOW THE TRIAL COURT SAID THE STATE COULDN'T USE THAT AGGRAVATOR BECAUSE THE FATAL BLOWS WERE STRUCK BEFORE THE KIDNAPPING COMMENCED. ALTHOUGH YOU CAN MAYBE ARGUE, WHO KNOWS, WHETHER HE FORMED THE INTENT FIRST OR NOT. BUT, THIS COURT HAS NEVER HELD THAT THERE'S A TIME SEQUENCE THAT GOES WITH THAT LANGUAGE. IN FACT, ALL THE CASES THAT TALK ABOUT IT, JOHNSON, ARCHULETA, AND HONIE IN A LITTLE MORE DIR – INDIRECT WAY, TREAT IT AS SIMPLY AN UNBROKEN CHAIN OF EVENTS. THE – THE LANGUAGE IS, "CONTINUITY OF ACTION OVER A SPAN OF TIME." IT'S TRUE THAT ARCHULETA TALKED ABOUT A JURY INSTRUCTION THAT USES THIS LANGUAGE, UM, "THAT THERE'S NO BREAK IN THE CHAIN OF EVENTS FROM THE INCEPTION [12] OF THE FELONY TO THE TIME OF THE HOMICIDE." I DON'T THINK THAT MEANS THAT THE FELONY HAS TO START FIRST. I THINK ALL THAT IS IS RECOGNIZING THAT IN MOST OF THESE CASES, THE AGGRAVATED

FELONY DOES BEGIN FIRST, BUT THERE ARE CERTAINLY LOTS OF CIRCUMSTANCES WHERE IT DOESN'T. UM, IN FACT JOHNSON, THE SEXUAL ASSAULT BEGAN AFTER THE ASSAULT THAT RESULTED IN THE MURDER BEGAN. IN TILLMAN, THE ARSON, WHICH ULTIMATELY KILLED TILLMAN, WAS STARTED AFTER THE FATAL BLOWS BECAUSE THE BLOWS WOULD HAVE BEEN FATAL FIRST. THE SEX OFFENSE IN HONIE IS A PRIME EXAMPLE, UM, WHERE IT LOOKS LIKE THE VICTIM MAY WELL HAVE EXPIRED BEFORE THE SEX OFFENSE, BUT THAT'S WHERE THE MURDER BEGAN BEFORE THE AGGRAVATOR. UM, AND THEN IN VON LESTER TAYLOR; THERE WAS A KIDNAPPING AFTER HE HAD KILLED SOME OF THE OTHER VICTIMS.

THE ISSUE HERE IS WHETHER IT'S SO CAUGHT UP TOGETHER. THE LEGISLATURE PRETTY CLEARLY INTENDED THAT THESE AGGRAVATORS BE INCLUDED FOR THE DEATH PENALTY BECAUSE THEY EITHER MAKE THE MURDER MORE HEINOUS, THEY MAKE IT EASIER TO COMMIT, THEY MAKE IT EASIER TO HIDE. AND I THINK THAT'S WHAT'S GOING ON HERE. AND SO, BASED ON THAT LANGUAGE, BASED ON THIS COURT'S PRECEDENT, WE WOULD SUBMIT THAT THE TRIAL COURT ERRED WHEN IT SAID THAT THE FELONY AGGRAVATOR HAD TO BEGIN BEFORE THE HOMICIDE. IN THIS CASE, THE TWO ARE CONTEMPORANEOUS IN EVERY MEANING OF THE WORD. AND IF THERE ARE NO FURTHER QUESTIONS, I'LL RESERVE THE [13] BALANCE OF MY TIME. THANK YOU.

CHIEF JUSTICE DURHAM: THANK YOU VERY MUCH. YOU MAY RESPOND.

MR. KINDOPP: THANK YOU. GOOD AFTERNOON.

THE FIRST ISSUE THAT I – I WOULD LIKE TO DISCUSS, AND OBVIOUSLY I CAN'T DISCUSS THEM ALL BECAUSE THERE'S MANY ISSUES AND MANY SUB-ISSUES, BUT THE FIRST ISSUE THAT – THAT – THAT I – I THINK NEEDS TO BE DISCUSSED IS WHETHER OR NOT THE STATE PROPERLY PRESERVED THIS ISSUE FOR APPEAL. UM, BOTH SIDES HAVE BRIEFED IT, UM, BUT I WANT TO RESPOND TO SOME COMMENTS THAT WERE IN – WERE IN THE STATE'S LAST BRIEF.

CHIEF JUSTICE DURHAM: WHICH ISSUE DO YOU MEAN? THE BIND – THE WHOLE BIND-OVER QUESTION?

MR. KINDOPP: THE WHOLE BIND-OVER QUESTION, BUT IN SPECIFIC, WHETHER OR NOT THE STATE PRESERVED THE ISSUE OF – OF INTENTIONALLY VERSUS KNOWINGLY WITH RESPECT TO THE MENTAL STATE THAT'S REQUIRED FOR A BIND-OVER ORDER FOR AGGRAVATED MURDER.

UM, IN THIS CASE, AS THE COURT'S AWARE, UM, A – A SPECIFIC FINDINGS AND ORDER WAS PREPARED IN ORDER TO MEMORIALIZE WHAT THE TRIAL COURT HAD DECIDED IN THIS MATTER. THAT FINDINGS AND ORDER WAS SPECIF – SPECIFICALLY PROVIDED TO THE IRON COUNTY ATTORNEY TO REVIEW AND HE ULTIMATELY SIGNED IT, APPROVING IT AS TO FORM AND CONTENT. [14] SO I THINK ANY ARGUMENT THAT THE COURT HAS, THAT THE TRIAL COURT DIDN'T APPLY THE CORRECT MENTAL STATE OR PERHAPS USED THE TERM

"SPECIFIC INTENT" AND SOMEHOW THAT THAT WAS FLAWED OR ERRONEOUS. I THINK THAT ISSUE WAS WAIVED. BUT –

CHIEF JUSTICE DURHAM: WELL – WELL, WAIT A MINUTE. YOU – YOU DON'T WAIVE, UM, THE CONTENT – OBJECTIONS TO THE CONTENT OF AN ORDER IF IT'S WHAT THE JUDGE HAS ALREADY RULED . . .

MR. KINDOPP: I AGR – I – I'M SORRY, I DIDN'T MEAN TO INTERRUPT. I AGREE. I AGREE THAT IF – IF THE TRIAL JUDGE WAS ERRONEOUS WITH RESPECT TO SOMETHING HE DID, AND IF HE APPLIED THE INCORRECT STANDARD, THE STATE CAN'T WAIVE THAT. I'M – WITH RESPECT TO THAT ARGUMENT I'M SPECIFICALLY REFERRING TO THE – PERHAPS, THE JUDGES USE OF THE TERM SPECIFIC INTENT WHEN DESCRIBING THE MENTAL STATE THAT'S REQUIRED FOR A BIND-OVER ORDER FOR AGGRAVATED MURDER.

NOW, WITH RESPECT TO THE DIFFERENCE BETWEEN INTENTIONALLY AND KNOWINGLY, THAT WAS NEVER ARGUED BELOW. UH, WE'VE MADE REFERENCES IN – IN OUR BRIEF TO THE SPECIFIC PORTIONS OF THE ARGUMENT THAT – THAT OCCURRED IN THE TRIAL COURT. AND AT THE CONCLUSION – UH, AND AT THE LAST HEARING WITH RESPECT TO THE BIND-OVER ORDER, THE IRON – IRON COUNTY ATTORNEY WAS SPECIFICALLY ASKED, "DO YOU AGREE THAT THE REQUISITE MENTAL STATE FOR A BIND-OVER ORDER [15] FOR AGGRAVATED MURDER IS, IN ESSENCE, AN INTENT TO KILL?" UH, AND –

UNIDENTIFIED JUSTICE: AND TWICE HE ANSWERED YES, INTENTIONALLY OR KNOWINGLY.

MR. KINDOPP: HE DID. AND THAT I THINK WAS PRIOR TO, THOUGH, HIM CONFIRMING THAT HE AGREED WITH THE MAGISTRATE OR THE – THE – THE, UH – IN THIS CASE THE DISTRICT JUDGE, THAT THE STANDARD WAS AN INTENT TO KILL. AND, YOU KNOW, GRANTED, ONE OF THE SPECIFIC ISSUES BELOW WAS – AND – AND WHAT THE STATE WAS CONTENDING WAS THAT THE STATE COULD INFER, UH, MR. GRAHAM'S MENTAL STATE FROM MR. SIMMONS' MENTAL STATE, SO PERHAPS HE WASN'T PARTICULARLY FOCUSED ON THE DIFFERENCE BETWEEN INTENTIONALLY OR KNOWINGLY, BUT THAT ISSUE WAS NEVER ARGUED. IT WAS NEVER SPECIFICALLY ARGUED THAT IF YOU DO NOT FIND THAT MR. GRAHAM ACT – ACTED INTENTIONALLY OR ACTED WITH A CONSCIOUS DESIRE TO CAUSE THE DEATH OF MR. ARNETT, UM, YOU – YOU CAN HOLD HIM OVER OR IF YOU FIND, PERHAPS, HE DIDN'T MEET THAT STANDARD. PERHAPS HE MEETS THIS LOWER STANDARD OF KNOWINGLY. YOU CAN STILL HOLD HIM OVER BECAUSE HE ACTED, UM, WITH REASONABLE CERTAINTY THAT HE WOULD CAUSE THE DEATH OF MR. ARNETT BY THE NATURE OF HIS CONDUCT OR THE NATURE OF HIS ACCOMPLICE.

UM, WHICH KIND OF BRINGS ME TO MY NEXT POINT WHICH IS – OBVIOUSLY ASSUMING THAT THIS ISSUE WAS PROPERLY [16] PRESERVED, UM, COMES TO THE ISSUE OF THE SPECIFIC LANGUAGE OF THE AGGRAVATED MURDER STATUTE. IT – IT HAS BEEN BRIEFED VERY WELL BUT I – I THINK

IT'S IMPORTANT TO DISCUSS IT, IN THAT, IF THE STATE IS CORRECT AND THE STATE OF UTAH CAN CONVICT A DEFENDANT OF AGGRAVATED MURDER BY ONE OF TWO MENTAL STATES, EITHER AN INTENTIONALLY OR A KNOWINGLY, WHICH THEY APPEAR TO CONTEND HAVE DIFFERENT LEVELS OF CULPABILITY WITH RESPECT TO ANY GIVEN DEFENDANT. IF THAT'S TRUE, THEN IT SEEMS TO ME THAT THE WORD INTENTIONALLY IN THE STATUTE WOULD MERE SURPLUSAGE. IT WOULDN'T REALLY SERVE ANY PURPOSE. BECAUSE IF YOU LOOK AT THE DEFINITIONS THAT ARE PROVIDED IN THE CODE, IT SEEMS TO ME THAT THE WORD "INTENTIONALLY" IS A HIGHER STANDARD. IT REQUIRES THAT THE STATE PROVE THAT THE DEFENDANT HAD A CONSCIOUS OBJECTIVE OR DESIRE TO CAUSE THE DEATH OF THE VICTIM. HOWEVER, THE "KNOWINGLY" DEFINITION THAT'S PROVIDED IN THE CODE SPECIFICALLY SAYS THAT THE STATE WOULD ONLY HAVE TO PROVE THAT THE DEFENDANT ENGAGED IN CONDUCT. AND BY ENGAGING IN THAT CONDUCT IT WAS REASONABLY CERTAIN THAT THE DEATH OF THE VICTIM WOULD OCCUR.

JUSTICE PARRISH: BUT UNDER YOUR READING THEN, THE OTHER TERM, THE TERM "INTENTIONALLY" IS – NO, I'M SORRY, THE TERM "KNOWINGLY" IS RENDERED MERE SURPLUSAGE.

MR. KINDOPP: WELL, THAT – THAT IS AN ISSUE. BUT I DON'T – I DON'T THINK SO. I DON'T THINK IT HAS TO [17] BE. I THINK THAT IN – IN INTERPRETING THE STATUTE AND INTERPRETING IT IN A MANNER SUCH THAT THE STATUTE WOULD BE CONSTITUTIONAL, BECAUSE YOU'RE NOT

REMOVING THIS – THIS – THIS – THE WORD "INTENTIONALLY" FROM THE INTERPRETATION OF THE REQUISITE MENTAL STATE, I THINK YOU CAN STILL USE BOTH WORDS. AND I THINK THAT THE TERM "KNOWINGLY" SHOULD BE APPLIED TO MEAN THAT THE DEFENDANT UNDERSTANDS AND APPRECIATES THE CONDUCT THAT HE IS EN – ACTUALLY ENGAGING IN. HE KNOWS WHAT HE IS DOING. SO I BELIEVE THAT'S WHAT THE TERM "KNOWINGLY" SHOULD REFER TO, IS THAT HE UNDERSTANDS WHAT HE IS DOING. AND NOT ONLY DOES HE UNDERSTAND WHAT HE IS DOING, BUT HE HAS A CONSCIOUS OBJECTIVE OR DESIRE TO CAUSE THE DEATH OF ANOTHER PERSON. SO BOTH WORDS, I THINK, CAN BE USED.

UNIDENTIFIED JUSTICE: BUT ONLY IF YOU READ IT INTENTIONALLY AND KNOWINGLY.

MR. KINDOPP: I – I THINK SO. I THINK YOU HAVE TO – I THINK YOU HAVE TO GIVE MEANING TO BOTH WORDS.

UNIDENTIFIED JUSTICE: BUT – BUT IT SAYS "INTENTIONALLY OR KNOWINGLY."

MR. KINDOPP: IT DOES. YOU'RE RIGHT. AND IT –

UNIDENTIFIED JUSTICE: SO YOU HAVE TO CHANGE THE WORD.

MR. KINDOPP: YOU'D HAVE – YOU'D HAVE TO CHANGE THE WORD OR YOU'D HAVE TO, I GUESS, HELP THE LEGISLATURE, [18] IN THAT, PERHAPS THE LEGISLATURE MEANT SOMETHING BUT DIDN'T USE THE CORRECT WORDS TO DESCRIBE WHAT THEY

WERE TRYING TO ACCOMPLISH. UM, IT – IT IS A PROBLEM. AND – AND I UNDERSTAND THAT THE STATUTE IS IN THE DISJUNCTIVE; IT'S NOT IN THE CONJUNCTIVE. BUT I DON'T KNOW HOW ELSE THAT YOU CAN GIVE MEANING TO THE WORD "INTENTIONALLY."

UNIDENTIFIED JUSTICE: WELL – AND – DID I UNDERSTAND YOU TO SUG – TO SUGGEST THAT IF THE LEGISLATURE HAD – WELL LET'S – I'LL PUT IT IN A HYPOTHETICAL. IF – IF THE LEGISLATURE HAD ONLY USED THE TERM "KNOWING" DEFINED AS, UH, UH, CON – CONDUCT ENGAGED IN WITH A REASONABLE CERTAINTY OF DEATH THAT THAT WOULD – WOULD HAVE BEEN CONSTITUTIONALLY INFIRM?

MR. KINDOPP: I – I DON'T, UM – WELL, I'LL – I'LL ANSWER YOUR QUESTION THIS WAY – AND – AND I'M NOT MEANING TO AVOID YOUR QUESTION. I THINK THAT THE LEGISLATURE COULD HAVE – COULD HAVE JUST USED THE WORD "KNOWINGLY" TO DESCRIBE THE MENS REA THAT'S REQUIRED FOR AGGRAVATED MURDER. BUT THEY DIDN'T. THEY USED "INTENTIONALLY OR KNOWINGLY." I THINK THAT ALSO RAISES ANOTHER ISSUE WITH RESPECT TO WHETHER OR NOT, UNDER THE EIGHTH AMENDMENT, IF YOU JUST USE THE TERM "KNOWINGLY," KNOWING THE STANDARD THAT'S IN THE CODE, OR THE DESCRIPTION OF "KNOWINGLY" THAT'S IN THE CODE, WHETHER OR NOT YOU – YOU WOULD RUN INTO PROBLEMS UNDER THE EIGHTH AMENDMENT WITH [19] RESPECT TO WHETHER OR NOT THAT IS A HIGH ENOUGH MENS REA, UH, OR HIGH ENOUGH LEVEL OF CULPABILITY IN ORDER

TO CONVICT SOMEBODY OF AGGRAVATED MURDER AND/OR PUT THEM TO DEATH IF THAT IS WHAT THE ULTIMATE PUNISHMENT IS. SO IT COULD HAVE ITS OWN CONSTITUTIONAL PROBLEMS OR RAMIFICATIONS IF THAT WAS THE ONLY TERM. UH, I UNDERSTAND THERE'S U.S. SUPREME COURT CASES THAT – THAT DISCUSS THIS ISSUE. NOT IN PARTICULAR THIS – THIS, UH – THE TERM "PURPOSEFULLY" AND ESPECIALLY AS DEFINED UNDER THE UTAH CODE. BUT I THINK YOU WOULD – YOU COULD POSSIBLY RUN INTO EIGHTH AMENDMENT PROBLEMS, UH, IF YOU'RE GOING TO BE PUTTING PEOPLE TO DEATH USING THAT MENS REA.

NOW, I – I THINK ANOTHER PROBLEM WITH SIMPLY USING THE WORD "KNOWINGLY" AND ALLOWING THAT TO BE USED AS A MENS REA FOR THE COMMISSION OF HOMICIDE, IT SEEMS – EXCUSE ME, FOR THE COMMISSION OF AN AGGRAVATED MURDER – IT – IT SEEMS TO ME YOU – YOU'RE ALLOWING, AT LEAST INITIALLY, THE PROSECUTOR DISCRETION TO CHOOSE, "AM I GOING TO CHARGE THIS AS 'INTENTIONALLY,' AM I GOING TO CHARGE IT AS 'KNOWINGLY,' OR AM I GOING TO CHARGE BOTH?" BECAUSE IF THEY'RE ONLY REQUIRED TO PROVE "KNOWINGLY" – THE KNOWINGLY MENTAL STATE, UH, IT – IT – IT'S HARD TO FIGURE UNDER WHAT CIRCUMSTANCES THEY WOULD EVER ELECT TO PROVE THE HIGHER MENS REA OR THE HIGHER LEVEL OF – OF MORAL LEGAL CULPABILITY. AND – AND I THINK THE PROBLEM WITH THAT IS [20] THAT NOW YOU – YOU'RE – YOU'RE SUBJECTING DEFENDANTS TO WHAT COULD BE – ULTIMATELY BE ARBITRARY,

CAPRICIOUS, AND/OR DISCRIMINATORY ENFORCEMENT OF THE AGGRAVATED MURDER STATUTE. THEY COULD CHOOSE TO CHARGE PURPOSE – PURPOSE – "PURPOSELY" LANGUAGE IN ONE COMPLAINT OR INFORMATION. UH, IN ANOTHER THEY COULD USE "INTENTIONALLY" AND IT WOULD BE SOLELY AT THEIR DISCRETION. AND THEN AS THE CASE PROCEEDS ALONG THROUGH THE PROCESS, UM, ULTIMATELY IT'S GOING TO BE LEFT TO JUDGES AND/OR JURIES WITH RESPECT TO WHICH STANDARD IS GOING TO BE USED. UM, AND OBVIOUSLY THAT ALSO DEPENDS UPON WHICH STANDARD IS ULTIMATELY – ULTIMATELY CHARGED, UH, OR WHICH STANDARD THE, UH, PROSECUTOR CHARGES THE DEFENDANT WITH. UM, WHICH – AND – AND IF THERE'S NO MORE QUESTIONS ON THAT SUBJECT I'LL, UH – I'LL MOVE ON.

I THINK ANOTHER PROBLEM WITH "KNOWINGLY" AND THE DEFINITION OF "KNOWINGLY" AS IS, UH, SET FORTH IN THE CODE, IS THAT IT'S SUBSTANTIALLY SIMILAR, UH, TO THE DEFINITIONS OF, UM – OF DEPRAVED INDIFFERENCE HOMICIDE AS WELL AS THE DEFINITION OF HOMICIDE THAT RESULTS AS – AS – AS, UH – AS THE CAUSE OF AN INTENT TO INFLICT SERIOUS BODILY INJURY. IF THE COURT LOOKS AT THOSE STATUTES AND COMPARES THEM WITH THE DEFINITION OF "KNOWINGLY" THEY ARE SUBSTANTIALLY SIMILAR IF NOT IDENTICAL WITH RESPECT TO, I THINK, WHAT THE LEVEL OF CULPABILITY IS. THE, UH –

UNIDENTIFIED JUSTICE: CAN YOU PUT A FINE POINT [21] FOR ME ON WHY THAT'S A PROBLEM?

MR. KINDOPP: I – I THINK IT'S A PROBLEM BECAUSE WHAT YOU'RE STARTING TO DO IS YOU'RE STARTING TO SERIOUSLY DEGRADE THE DIFFERENCE – THE DIFFERENCES BETWEEN AGGRAVATED MURDER AND – AND SIMPLE MURDER.

UNIDENTIFIED JUSTICE: WELL, BUT YOU'VE GOT A – YOU'VE GOT A STATUTORY SCHEME THAT IS APPARENTLY DESIGNED TO OFFER, UH, DECREASING LEVELS OF CONSCIOUS DESIRE TO – TO CAUSE AN END RESULT, AND ATTACHING VARIOUS DEGREES OF PUNISHMENT DEPENDING ON WHERE YOU FALL ON THAT SPECTRUM. IF YOU'RE DRIVING DRUNK AND YOU KILL SOMEBODY THAT'S, PERHAPS OVER HERE, AND IF YOU WALK UP TO SOMEBODY WITH A GUN INTENDING TO KILL THEM WITH THE GUN, THAT'S PERHAPS OVER HERE. BUT I DON'T UNDERSTAND WHY THAT CAUSES YOU UNDO CONCERN.

MR. KINDOPP: I – I THINK THE CONCERN IS CAUSED BY THE FACT THAT, IF YOU LOOK AT THE DEFINITION OF "PURPOSELY" AS DEFINED IN THE CODE AND YOU COM – WHICH IS THE TERM THAT'S USE – EXCUSE ME, "KNOWINGLY," I APOLOGIZE, "KNOWINGLY" AS IS USED IN THE AGGRAVATED MURDER STATUTE AND THEN YOU COMPARE IT TO THE DEPRAVED INDIFFERENCE STATUTE, OR PORTION OF THE STATUTE, AS WELL AS THE STATUTE THAT DEFINES HOMICIDE BY INTENDING TO CAUSE SERIOUS BODILY INJURY, THERE'S REAL – REAL NO DIFFERENCE IN THE LEVEL OF MORAL – MORAL CULPABILITY. IT – IT – IT'S – IT'S [22] NEARLY IDENTICAL.

CHIEF JUSTICE DURHAM: WELL, ARE YOU CLAIMING THAT THAT'S – I MEAN, THERE'S A BASIC PROBLEM IF THE – IF THE STATE MAKES THE SAME ACTS ELIGIBLE FOR PUNISHMENT AS A GREATER OR A LESSER OFFENSE, THE DEFENDANT USUALLY GETS THE BENEFIT OF THE DOUBT ON THAT. ARE YOU – ARE YOU CLAIMING THAT THAT'S WHAT WE WOULD HAVE HERE UNDER THE STATE'S READING OF THE STATUTE? THAT IN ESSENCE THE DEFINITION OF AGGRAVATED MURDER UNDER THIS – UNDER THIS PROVISION WOULD BE IDENTICAL TO THAT OF DEPRAVED INDIFFERENCE HOMICIDE?

MR. KINDOPP: IT WOULD – I'M NOT SURE THAT IT WOULD BE IDENTICAL, BUT IT WOULD BE VERY, VERY CLOSE. AND IN THE – AND THE ISSUE, I THINK, ALSO IS THAT AN AGGRAVATED MURDER STATUTE, WHERE YOU'RE POTENTIALLY GOING TO PUT PEOPLE TO DEATH, NEEDS TO DIFFERENTIATE.

CHIEF JUSTICE DURHAM: SURE.

MR. KINDOPP: AND IT NEEDS TO BE REAL – THERE NEEDS TO BE A REAL CLEAR DIFFERENTIATION BETWEEN WHAT SUBJECTS A DEFENDANT TO MURDER AS OPPOSED TO CAPITAL MURDER.

JUSTICE WILKINS: YOU MEAN LIKE MAYBE LISTING AGGRAVATING FACTORS?

MR. KINDOPP: THAT'S – THAT'S –

JUSTICE WILKINS: ISN'T THAT THE DIFFERENCE BETWEEN THE TWO?

[23] MR. KINDOPP: THAT IS. BUT THERE SHOULD ALSO BE A . . .

JUSTICE WILKINS: ISN'T THAT ENOUGH?

MR. KINDOPP: NO. I BELIEVE THERE SHOULD ALSO BE A MENS REA DIFFERENCE. I BELIEVE THERE NEEDS TO BE A CLEAR DIFFERENCE IN THE MENS REA, UH, WHICH IS – IS – IS DIRECTLY EQUIVALENT TO MORAL AND LEGAL CULPABILITY. THERE NEEDS TO BE A HEIGHTENED STANDARD. AND IN THIS CASE, IT WOULD BE THE WORD "INTENTIONALLY" AS OPPOSED TO, UH, THE WORD "KNOWINGLY."

I SEE I'M – I'M RUNNING SHORT ON TIME SO I – I – WITH THE COURT'S PERMISSION I'D LIKE TO SWITCH TO THE NEXT, I THINK, MAJOR ISSUE WHICH IS THE, UH – THE AGGRAVATING CIRCUMSTANCE IN THIS CASE, UH, WHICH IS ALLEGED TO BE THAT, UH, THERE WAS A, UH – AN AGGRAVATED – OR, EXCUSE ME, THERE WAS A KIDNAPPING OR A – AGGRAVATED KIDNAPPING THAT OCCURRED WHILE MR. GRAHAM WAS ENGAGED IN THE COMMISSION OF, UM, A KIDNAPPING.

UM, WHAT I'VE BRIEFED FOR THE COURT AND WHAT I THINK IS VERY IMPORTANT IS THE LANGUAGE THAT'S CONTAINED WITHIN, UM – WITHIN THAT PARTICULAR SUBDIVISION OF THE AGGRAVATED MURDER STATUTE. IT SPECIFICALLY STATES THAT, "THE HOMICIDE MUST OCCUR WHILE THE DEFENDANT IS ENGAGED IN THE COMMISSION OF THE UNDERLYING FELONY." IN THIS CASE THAT WOULD BE A KIDNAPPING. WE BELIEVE THAT IN ORDER TO [24] GIVE – THE COURT MUST GIVE

IMPORT TO THAT LANGUAGE AND IN PARTICULAR THE LANGUAGE THAT INDICATES THAT, "THE HOMICIDE MUST OCCUR WHILE THE DEFENDANT IS ENGAGED IN THE COMMISSION OF THE UNDERLYING FELONY."

UNIDENTIFIED JUSTICE: WELL, WHEN – WHEN THEN COUNSEL DID THIS HOMICIDE OCCUR – AC – ACTUALLY I GUESS THIS STATUTE USE – USES "COMMITTED." THAT IS TO SAY, WHEN DID THE HOMICIDE COMMENCE AND WHEN DID IT CONCLUDE?

MR. KINDOPP: WELL, I – I BELIEVE –

UNIDENTIFIED JUSTICE: IF YOU ACCEPT THE ALLEGED FACTS.

MR. KINDOPP: THE – UNDER THE FACTS OF – OF – OF THE CASE AS – AS SET FORTH AT THE PRELIMINARY HEARING, THE HOMICIDE WOULD HAVE COMMENCED WHEN MR. ARNETT WAS STRUCK ON THE HEAD WITH THE BAT.

UNIDENTIFIED JUSTICE: FIRST BLOW COMMENCES THE HOMICIDE.

MR. KINDOPP: WELL, THAT – THAT'S AN INTERESTING QUESTION. I – I BELIEVE THAT – THAT A REASONABLE INTERPRETATION WOULD BE THE FIRST BLOW COMMENCES THE ACTS THAT ULTIMATELY LED TO THE DEATH, WHICH WOULD BE THE COMMENCEMENT OF THE HOMICIDE.

UNIDENTIFIED JUSTICE: WELL, ISN'T IT – AND – IT – YEAH, ISN'T IT TRUE THEN THAT THE

HOMICIDE IS IN COMMISSION, SO TO SPEAK, UM, UNTIL THE VICTIM ACTUALLY [25] DIES.

MR. KINDOPP: I – I – I DON'T – I DON'T BELIEVE SO. I – I THINK WHAT YOU HAVE TO LOOK AT IS YOU HAVE TO LOOK AT THE ACT –

UNIDENTIFIED JUSTICE: . . .

MR. KINDOPP: – THE ACT THAT RESULTS IN – IN – IN THE DEATH AS OPPOSED TO LOOKING AT THE END RESULT. I THINK THERE HAS TO BE A – A CONCURRENCE OF THE MENTAL STATE AT THE TIME THE ACT WAS COMMITTED . . .

JUSTICE PARRISH: WELL COUNSEL, THEN IN A CASE WHERE YOU ASSUME SOMEONE IS SH – KILLED BY BEING SHOT IN THE HEAD WITH ONE SHOT, DOES THAT MEAN THAT THE COMMISSION OF THE HOMICIDE LASTS A PORTION OF A SECOND? AND IF SO, HOW WOULD YOU EVER HAVE ANOTHER CRIME THAT HAPPENED DURING THE COMMISSION OF THE HOMICIDE?

MR. KINDOPP: YOU – YOU MAY NOT. IF – IF – IF SOMEBODY IS SIMPLY SHOT IN THE HEAD AND THAT IS – THAT'S THE END OF IT – THE – THERE – THERE MAY NOT BE THE COMMISSION OF ANOTHER – ANOTHER CRIME OR ONE OF THE STATUTE – STATUTORILY ENUMENATE – ENUMERATED AGGRAVATING CIRCUMSTANCES.

UNIDENTIFIED JUSTICE: SO . . .

MR. KINDOPP: AND THAT'S – THAT'S – AND I THINK THAT'S ONE OF THE DIFFERENCES BETWEEN, UH, MURDER AND AGGRAVATED MURDER.

[26] JUSTICE NEHRING: SO I POISON SOMEBODY, THEY DISCOVER IT, I KIDNAP THEM, LOCK THEM IN A CLOSET, AND THEY DIE. KIDNAPPING NOT – DIDN'T OCCUR WHILE THE HOMICIDE – DURING THE COMMISSION OF THE HOMICIDE?

MR. KINDOPP: WELL THE – THE – THE KIDNAPPING, I THINK, WOULD COMMENCE AS SOON AS THE PERSON IS, UH, DETAINED OR RESTRAINED. SO IF THEY'RE KNOCKED UNCONSCIOUS BY THE POISONING, I THINK THEN YOU HAVE THE – THE KIDNAPPING IS – IS UNDERWAY AT THAT POINT. AND THEN IF YOU KILL THEM OR – OR THE POISON KILLS THEM AFTER YOU HAVE KIDNAPPED THEM, BECAUSE YOU KNOCKED THEM UNCONSCIOUS BY THE POISON I'M PRESUMING THEN, UH – THEN THAT DOES OCCUR.

JUSTICE NEHRING: WELL THEN DISTINGUISH THAT FROM THE BASEBALL BAT.

MR. KINDOPP: WELL, THE DIFFERENCE IS THAT THE – THE ACT IN THIS CASE THAT – THAT CAUSES THE KIDNAPPING OCCURS SIMULTANEOUSLY WITH THE ACT THAT CAUSES THE DEATH. AND I BELIEVE UNDER YOUR HYPOTHETICAL, THE KIDNAPPING OCCURRED AND THEN THE – THE – THE DEATH RESULTED AT SOME LATER POINT IN TIME VIA – VIA THE POISON.

JUSTICE NEHRING: SO IT'S JUST A MA – THE – THE SIMULTANEITY I GUESS IS THE – IS THE PROBLEM HERE. . . . THERE'S A – I'M NOT SURE THAT IN YOUR CASE YOU HAVE SIMULTANEITY . . .

JUSTICE DURRANT: OKAY. WELL HERE THE BLOW [27] OCCURS – THE – THE EQUIVALENT OF THE IN – IN – SAY THE INSERTION OF THE POISON, THE BLOW OCCURS AND THE DEATH DOESN'T OCCUR UNTIL THE NEXT DAY, JUST AS IN – IN – IN THIS, UH, HYPOTHETICAL. UH, THE – THE – THE POISON IS ADMINISTERED AND THE DEATH DOESN'T OCCUR UNTIL LET'S SAY THE NEXT DAY. HOW WOULD THE – HOW WOULD THEY BE DISTINGUISHABLE? WHY DOESN'T THE COMMISSION OF THE CRIME SPAN THE TIME FROM THE – THE CONDUCT AT ISSUE TO THE – THE RESULT OF – OF THE CONDUCT THAT ACTUALLY COM – COMPLETES THE CRIME ITSELF? THAT IS TO SAY, IT'S NOT A HOMICIDE UNTIL THE VICTIM DIES.

MR. KINDOPP: THAT IS CORRECT. IT'S NOT A HOMICIDE UNTIL THE VICTIM DIES, BUT I THINK YOU HAVE TO FOCUS ON THE ACT. AND I THINK THE DIFFERENCES BETWEEN THIS SITUATION AND YOUR HYPOTHETICAL WITH THE POISON IS THAT I'M – I'M – I'M ASSUMING THAT IT TAKES TIME FOR THIS POISON TO KILL THE PERSON.

JUSTICE DURRANT: MM-HMM.

MR. KINDOPP: BUT WITH – WITH THE BLOW OF THE BASEBALL BAT IT'S – IT'S ONE, TWO – ONE AND THEN A SUB – SUB – SECOND SUBSEQUENT BLOW WITH THE BASEBALL BAT THAT CAUSES THE DEATH. THERE'S NOT –

JUSTICE DURRANT: BUT IT TOOK TIME TO – IT TOOK TIME FOR THAT BLOW TO KILL THE VICTIM HERE.

MR. KINDOPP: IT DID.

[28] JUSTICE DURRANT: IT TOOK OVER – UNTIL THE NEXT DAY.

MR. KINDOPP: IT DID.

JUSTICE DURRANT: SO HOW IS THAT DISTINGUISHABLE FROM THE POISON HYPOTHETICAL?

MR. KINDOPP: WELL I – I THINK IT'S DIFFERENT BECAUSE ONCE AGAIN I THINK YOU HAVE TO GO BACK TO THE CONCURRENCE OF THE – THE ACT AND THE INTENT. I – I THINK YOU HAVE TO LOOK AT THE INTENT AT THE TIME; NOT AT SOME LATER POINT IN TIME. AND I UNDERSTAND THAT – THAT THE DEATH OCCURS LATER, BUT IT'S THE CONCURRENCE OF THE ACT AND INTENT I THINK YOU HAVE TO FOCUS ON. AND I THINK THAT'S THE CRITICAL POINT IN TIME THAT YOU HAVE TO LOOK AT.

JUSTICE WILKINS: SO IF, HYPOTHETICALLY, I ACTUALLY INTEND TO KILL SOMEBODY, THAT'S MY CONSCIOUS MOTIVE. I WALK UP, I SHOOT HIM BUT I HIT IN THE SH – IN THE ARM. ONLY GOT ONE BULLET. SO I FIGURE, OKAY, MAYBE THEY CAN BLEED TO DEATH FOR ME. AND SO I THEN TAKE THEM OVER AND LOCK THEM IN A CLOSET; LOCK THEM IN A ROOM; BURY THEM IN A HOLE; AND LEAVE THEM. THE KIDNAPPING IN THAT INSTANCE COMES AFTER THE COMMISSION OF THE CRIME? AF – AFTER THE COMMISSION OF THE HOMICIDE?

MR. KINDOPP: WELL UN – UNDER THAT HYPOTHETICAL, UM, THE – I DON'T THINK THE KIDNAPPING OCCURS UNTIL THE PERSON IS DETAINED OR RESTRAINED. SO UNTIL THEY'RE [29] DETAINED OR RESTRAINED THE – THERE'S NO KIDNAPPING. BUT I THINK THERE MIGHT BE SOMETHING MISSING.

JUSTICE WILKINS: PRETTY WELL DETAINED HIM WHEN I SHOT HIM.

MR. KINDOPP: PARDON ME?

JUSTICE WILKINS: PRETTY WELL DETAINED HIM WHEN I SHOT HIM.

MR. KINDOPP: WELL, IF – IF YOU SHOT HIM AND – AND HE WAS INCAPACITATED AND THEN YOU – YOU MOVED HIM SOMEPLACE, CERTAINLY YOU'VE GOT A KIDNAPPING IN THAT SCENARIO.

JUSTICE WILKINS: OKAY. HOW ABOUT IF I HIT HIM ON THE HEAD WITH A BASEBALL BAT AND KNOCK HIM OUT OR KNOCK HIM DOWN?

MR. KINDOPP: WELL THAT – THAT'S – I – I THINK THAT'S MY POINT EXACTLY, IS THAT AS SOON AS HE IS HIT IN THE HEAD WITH THE BAT AND HE IS KNOCKED UNCONSCIOUS AND INCAPACITATED, THE KIDNAPPING HAS COMMENCED.

JUSTICE WILKINS: OKAY. THEN –

MR. KINDOPP: BUT UNTIL HE'S NOT – UNTIL HE'S UNCONSCIOUS AND INCAPACITATED IT DOESN'T COMMENCE. AND – AND – AND – AND WE BELIEVE –

JUSTICE WILKINS: WHAT AM I MISSING HERE? WHY ISN'T THAT WHILE HE WAS COMMITTING THE HOMICIDE?

MR. KINDOPP: BECAUSE . . .

[30] JUSTICE WILKINS: IN YOUR CASE? WHY ISN'T THAT – IF – IF – IF THE FATAL BLOW COMMENCES BOTH THE HOMICIDE AND THE KIDNAPPING, WHY DOESN'T THAT EXACTLY TRACK THE LANGUAGE OF THE STATUTE?

MR. KINDOPP: IT – IT COULD. IT COULD.

JUSTICE WILKINS: WHY DOESN'T IT?

MR. KINDOPP: AND – AND – IN – IT – IT PERHAPS CAN'T. IT DEPENDS ON THE INTERPRETATION – I THINK IT GOES BACK TO THE INTERPRETATION OF, UH, THE AGGRAVATED MURDER STATUTE AND WHICH MENS REA YOU USE. IT COULD. THE – THE BLOW TO THE HEAD COULD SIMULTANEOUSLY COMMENCE THE KIDNAPPING AND ALSO COMMENCE THE HOMICIDE. THE PROBLEM YOU THEN HAVE IS THEN I THINK CONFLICT – CONFLICTING MENTAL STATES. BECAUSE IF HE INTENDED TO KIDNAP HIM OR HE INTENDED HIS ACCOMPLICE TO KIDNAP HIM BY STRIKING HIM IN THE HEAD WITH THE BAT, THEN HE DIDN'T INTEND TO KILL HIM.

JUSTICE WILKINS: I – I HEAR WHAT YOU'RE SAYING –

MR. KINDOPP: YES.

JUSTICE WILKINS: – I'M JUST NOT SURE I UNDERSTAND THE LOGIC BEHIND THAT. WHY CAN'T YOU INTEND BOTH? DO YOU HAVE TO INTEND THAT HE DIE INSTANTLY?

MR. KINDOPP: NO. YOU – IF – THE INTENT TO KIDNAP NECESSARILY MEANS THAT YOU INTEND TO KEEP SOMEBODY ALIVE. IT DOESN'T MEAN YOU INTEND TO KILL . . .

[31] JUSTICE WILKINS: NO. IT – IT MEANS THAT YOU INTEND FOR THEM TO BE RESTRAINED UNLAWFULLY. BUT MAYBE YOU WANT TO RESTRAIN THEM WHILE THEY DIE. MAY – MAYBE YOU'VE POISONED THEM. MAYBE THEY – MAYBE YOU THINK IT'S GOING TO TAKE AWHILE. MAYBE YOU'RE GOING TO BURY THEM IN A HOLE AND NOT COME BACK FOR THEM.

MR. KINDOPP: BUT – I –

JUSTICE WILKINS: BUT I DON'T UNDERSTAND HOW YOU CAN'T HAVE BOTH INTENTS AT THE SAME TIME.

MR. KINDOPP: BECAUSE I BELIEVE THAT AN – AN – AN INTENT TO KINDOPP [sic] IS – IS – IS DIFFERENT THAN AN – AN ATTEMPT TO KILL. AND THAT – NECESSARILY . . .

JUSTICE WILKINS: AND YOU CAN ONLY HAVE ONE INTENT AT A TIME?

MR. KINDOPP: YES.

JUSTICE WILKINS: OKAY.

MR. KINDOPP: AT THE SAME TIME. AT THE EXACT SAME TIME.

JUSTICE WILKINS: OKAY. I CAN'T INTEND TO BOTH, UH, DRIVE WHILE DRUNK AND STEAL A CAR AT THE SAME TIME?

MR. KINDOPP: I – I THINK THAT'S, UH, SUBSTANTIALLY DIFFERENT. THE – THEN – BECAUSE –

JUSTICE WILKINS: ON A – ON A THEORETICAL LEVEL?

MR. KINDOPP: ON – ON A THEORETICAL LEVEL – LEVEL BECAUSE – BECAUSE AN INTENT TO KIDNAP NECESSARILY [32] MEANS THAT YOUR OBJECTIVE IS TO KEEP THAT PERSON ALIVE.

JUSTICE WILKINS: NO IT ISN'T. AN INTENT TO KIDNAP MEANS THAT, FOR NOW, YOU INTEND TO HOLD THAT PERSON IN A PLACE THEY DON'T WANT TO BE.

MR. KINDOPP: MM-HMM. YEAH. I AGREE.

JUSTICE WILKINS: AND YOU CAN'T KIDNAP A DEAD PERSON.

MR. KINDOPP: RIGHT.

JUSTICE WILKINS: RIGHT?

MR. KINDOPP: YES.

JUSTICE WILKINS: OKAY. BUT YOU CAN INTEND TO KILL SOMEONE. I CAN FORM THE INTENT. RIGHT? I CAN TAKE AN INITIAL STEP THAT WILL RESULT IN THE DEATH OF THE PERSON. AND

I CAN ALSO – AT THE SAME TIME I CAN INTEND TO HOLD THEM INCOMMUNICADO, HOLD THEM FROM GETTING MEDICAL HELP, HOLD THEM FROM BEING RESCUED WHILE THAT GOES ON; CAN'T I?

MR. KINDOPP: WELL, I BELIEVE IF YOU ARE HOLDING THEM INCOMMUNICADO AND – AND YOU'RE KEEPING THEM ALIVE, THEN YOU'RE INTENDING TO DO – DO EXACT – EXACTLY THAT. YOU'RE INTENDING TO KEEP THEM ALIVE. YOU'RE NOT INTENDING TO KILL THEM.

JUSTICE WILKINS: OKAY. I UNDERSTAND YOUR POINT. THANK YOU.

CHIEF JUSTICE DURHAM: THANK YOU VERY MUCH [33] COUNSEL. YOU MAY RESPOND.

MS. DUPAIX: JUST A COUPLE OF THINGS BRIEFLY. WITH RESPECT TO THIS AGGRAVATOR – THE AGGRAVATED KIDNAPPING – I THINK IT'S VERY CLEAR, AS JUSTICE WILKINS HAS POINTED OUT, THAT YOU CAN HAVE AN INTENT TO KIDNAP AND AN INTENT TO KILL, UM, WHETHER IT'S INTENTIONAL OR KNOWING AT THE SAME TIME.

I THINK JUSTICE NEHRING'S HYPOTHETICAL REALLY POINTS THAT OUT. IF YOU POISON THEM INTENDING THAT THEY DIE, THEY FIND OUT THAT THEY'VE BEEN POISONED AND ARE GOING TO SEEK HELP, YOU STOP THEM FROM DOING THAT BY RESTRAINING AND DETAINING THEM TO ENSURE THAT THE POISON WORKS AND THAT THEY DIE. YOU HAVE A HOMICIDE AND AN INDEPENDENT KIDNAPPING. AND I THINK THE LEGISLATURE INTENDED THAT THAT KIDNAPPING BE ABLE TO BE

USED AS AN AGGRAVATOR BECAUSE, IN FACT, THIS IS A WAY THAT YOU'RE ABLE TO ACCOMPLISH YOUR FINAL DESIGN. IF YOU HADN'T BEEN ABLE TO DETAIN AND RESTRAIN, ARGUABLY YOU WOULDN'T HAVE BEEN ABLE TO COMMIT YOUR HOMICIDE.

UM, BUT I WOULD LIKE TO CLARIFY ONE POINT. I DON'T THINK KNOCKING SOMEBODY UNCONSCIOUS IS A KIDNAPPING. IF THE DEFENDANTS HERE HAD SIMPLY KNOCKED ARSON (SIC) ARNETT ON THE HEAD AND LEFT HIM CONVULSING OR EVEN JUST UNCONSCIOUS ON THE FLOOR, I DO NOT THINK WE WOULD BE HAVING THIS DISCUSSION ABOUT A KIDNAPPING AGGRAVATOR, BECAUSE THEY [34] DID NOTHING TO ACTUALLY DETAIN OR RESTRAIN HIM BEYOND THE ASSAULT THAT RESULTED IN THE MURDER. THE KIDNAPPING HERE IN THIS CASE WAS WHEN THEY PICKED HIM UP AND PUT HIM IN THE CLOSET AND LOCKED HIM, THEREBY DETAINING HIM AND RESTRAINING HIM. SO THAT'S WHERE THE KIDNAPPING IS. IT – IT ISN'T THIS IDEA THAT YOU JUST KNOCK SOMEBODY UNCONSCIOUS –

JUSTICE WILKINS: WELL, THEORETICALLY, IF YOU WANT TO KEEP SOMEONE FROM LEAVING A PLACE AND YOU KNOCK THEM OUT TO KEEP THEM THERE; COULDN'T THAT BE A KIDNAPPING?

MS. DUPAIX: YOU KNOW I THINK ARGUABLY IT IS, BUT I THINK IT CAN BE A BIT OF A STRETCH. BECAUSE IF YOU TAKE NO OTHER ACTION AND THEY REGAIN CONSCIOUSNESS AND THEY CAN THEN LEAVE, YOU HAVEN'T REALLY

RESTRAINED THEM FROM LEAVING. YOU'VE JUST KNOCKED THEM UNCONSCIOUS.

AND I THINK THE REASON I WANT TO MAKE THIS DISTINCTION – IT SORT OF SLOPS OVER INTO THE DEFENDANT'S ISSUE, WHICH WE HAVEN'T DISCUSSED TODAY, IS THAT THE KIDNAPPING HAS TO BE SOMETHING INDEPENDENTLY SIGNIFICANT FROM THE HOMICIDE ITSELF, WHICH STEMS FROM THAT LINE OF CASES, COUCH AND FINLAYSON, WHEN YOU'RE TALKING ABOUT RAPES AND ROBBERIES THAT, UM, THERE'S AN INHERENT DETENTION IN THESE KINDS OF CRIME. AND THAT INHERENT DETENTION BY ITSELF ISN'T GOING TO GET YOU AN ADDED COUNT OF KIDNAPPING. YOU HAVE TO HAVE SOMETHING INDEPENDENT OF THAT. AND IN [35] THIS CASE, LIKE I SAID, I THINK IF THEY HAD SIMPLY KNOCKED OUT ARSON – OR ANSON ARNETT, WE WOULD NOT BE ARGUING THAT THERE WAS A KIDNAPPING HERE.

CHIEF JUSTICE DURHAM: WHAT IF THEY'D JUST TIED HIM UP.

MS. DUPAIX: I THINK YOU COULD ARGUE THAT'S A KIDNAPPING BECAUSE THEN YOU'VE DETAINED OR RESTRAINED HIM; WHICH IS THE STATUTORY LANGUAGE. MY ONLY POINT IS IS KNOCKING SOMEBODY OUT WITH A BASEBALL BAT REALLY DOESN'T FIT WITHIN AT LEAST WHAT I NORMALLY THINK OF RESTRAINING OR DETAINING. SO I JUST WANTED TO MAKE THAT CLEAR. THAT – THE DETENTION HERE, AND IT'S WHAT THE TRIAL COURT FOUND TOO, WAS THE LOCKING HIM

IN THE CLOSET. AND HE WAS THERE FOR OVER AN HOUR.

JUSTICE WILKINS: WHAT'S THE STATE'S POSITION ON WHEN THE HOMICIDE IS COMMITTED? UH, JUSTICE NEHRING'S EXAMPLE WITH THE POISONING.

MS. DUPAIX: YEAH. I – I AGREE WITH JUSTICE DURRANT, UH, ASSUMING THAT'S WHAT HE MEANT TO SAY. THAT THE HOMICIDE IS COMMITTED – OR IT'S FINISHED ONCE THE – THE VICTIM DIES.

JUSTICE WILKINS: SO, UH, THE COMMISSION OF A HOMICIDE –

MS. DUPAIX: IS ONGOING.

JUSTICE WILKINS: – WOULD BEGIN WITH THE FIRST [36] BLOW OR THE POKE OF THE NEEDLE AND WOULD NOT END UNTIL THE PERSON DIED.

MS. DUPAIX: RIGHT.

JUSTICE WILKINS: NO TIME LIMIT?

MS. DUPAIX: UM, ARGUABLY NOT. UM, BUT I THINK THERE DOES – I WILL SAY – I SUPPOSE IF YOU WERE SLOWLY POISONING SOMEBODY AND AT THE SAME TIME WERE COMMITTING INDEPENDENT KIDNAPPINGS OR ROBBERIES, I THINK THE STATE MIGHT BE HARD PRESSED TO ARGUE THAT THE HOMICIDE WAS COMMITTED WHILE YOU WERE ENGAGED IN THOSE, BECAUSE THERE'S NOT

MUCH OF A CONNECTION. ARGUABLY THERE WOULDN'T BE MUCH OF A CONNECTION.

JUSTICE WILKINS: SO THERE HAS TO BE REASONABLE CONTEMPORANEOUS OVERLAP.

MS. DUPAIX: YES. AND SOME – SOME KIND OF CONNECTION TO IT; YES. AND OF COURSE I THINK WE – CLEARLY WE HAVE THAT HERE. THERE'S – THERE'S NO TIME DIFF – DIFFERENTIATION HERE BETWEEN THE BEGINNING OF THE HOMICIDE, THE BEGINNING OF THE KIDNAPPING, AND THE END OF THE KIDNAPPING AND THEN THE DEATH.

JUSTICE WILKINS: I WAS MORE CONCERNED ABOUT THE THEORETICAL IMPACT. SO R. J. REYNOLDS MAY OR MAY NOT BE CITABLE FOR HOMICIDE.

MS. DUPAIX: YES. AND IT MAY OR MAY NOT BE AGGRAVATED BASED ON ANY FELONIES THAT HE MIGHT HAVE [37] COMMITTED WHILE OTHER PEOPLE ARE DYING AS A RESULT.

JUSTICE WILKINS: (LAUGHING.)

MS. DUPAIX: SO, YES. THAT'S RIGHT. I DO THINK THERE HAS TO BE SOME CONNECTION. AND MAYBE ONE WAY TO THINK OF IT IS LIKE A SINGLE CRIMINAL EPISODE THAT EVERYTHING SORT OF, UM, COMBINED AND INVOLVED, UM, TOGETHER.

JUSTICE WILKINS: ARE OF A PIECE, AS IT WERE.

MS. DUPAIX: YES. AND I THINK THAT'S WHAT ARCHULETA, JOHNSON, TILLMAN, AND ALL OF THOSE CASES LOOKED AT, AND HONIE. THAT IT WAS ALL PART OF THE SAME CONDUCT. IT WAS JUST HAPPENING. BUT THAT'S A PROBLEM WITH THE DEFENDANT'S ARGUMENT – OR HIS RULE. IT'S REALLY UNWORKABLE BECAUSE IT'S ALMOST IMPOSSIBLE TO PARSE OUT EXACTLY WHEN PEOPLE FORM THE INTENT FOR THIS OR THAT. AND WHEN THESE THINGS HAPPEN, THEY HAPPEN SO QUICKLY THAT PROBABLY YOU CAN'T PARSE OUT WHEN SOMEBODY DECIDES TO WHAT AND WHEN AND WHY.

SO, BASED ON THAT, WE THINK THAT THE TRIAL COURT WAS WRONG IN SUGGESTING THERE WAS A TIME SEQUENCE REQUIREMENT HERE. THAT IT'S REALLY JUST WHETHER OR NOT IT'S ALL CONNECTED IN AN UNBROKEN CHAIN OF EVENTS.

UM, JUST QUICKLY TO RESPOND TO, UM, THE MENTAL STATE ARGUMENT. UM, "KNOWING" DOES NOT NECESSARILY MEAN INTENTIONAL, AND I THINK CASEY MAKES THAT CLEAR. BUT IF [38] YOU PROVE "INTENTIONAL" YOU'VE PROVED "KNOWING." SO THE TWO ARE TOGETHER. BUT I THINK IT MIGHT BE HELPFUL IN TALKING ABOUT THIS IN TERMS OF MORAL CULPABILITY. THAT, AT COMMON LAW, "INTENTIONAL" AND "KNOWING" WERE CONSIDERED THE SAME. UH, AGAIN IF I MIGHT REFER TO STANDIFORD, UH, IN FOOTNOTE ONE, JUSTICE STEWART EXPLAINED THAT, "COMMON LAW AUTHORITIES INCLUDED IN THE NOTION OF INTENT TO KILL, AWARENESS THAT THE DEATH OF ANOTHER WOULD RESULT FROM ONE'S ACTIONS,

EVEN IF THE ACTOR HAD NO PARTICULAR DESIRE TO ACHIEVE SUCH A CONSEQUENCE."

AND OF COURSE THE REASON THEY WOULD INCLUDE THAT AND WE INCLUDE IT TODAY, IS WE DON'T WANT PEOPLE TO GET OFF THE HOOK WHEN, EVEN THOUGH THEY MAY NOT HAVE, AS A CONSCIOUS DESIRE, TO KILL SOMEBODY, THAT THEY DO SOMETHING THAT IS DARN WELL CERTAIN TO KILL THAT PERSON.

TIMOTHY MCVEIGH MIGHT BE A PRIME EXAMPLE. HE HAD PA – HE PARKS HIS BIG FERTILIZER BOMB OUTSIDE A BUSY OFFICE BUILDING DURING THE DAY WHEN PEOPLE ARE AT WORK. HE MIGHT SAY, "WELL, I DIDN'T INTEND TO KILL ANYBODY. I – I WASN'T – IT WASN'T MY CONSCIOUS OBJECTIVE. I WAS JUST MAKING A STATEMENT." HOWEVER, NOBODY WOULD QUESTION THAT HE WAS CERTAINLY AWARE THAT BY DOING THAT HE WAS GOING TO KILL SOMEBODY.

JUSTICE NEHRING: SO IF A . . . SO UNDER YOUR INTERPRETATION, WHY WOULD A PROSECUTOR EVER ELECT TO [39] PROCEED, UH, UNDER AN "INTENT" STANDARD WHEN THIS MUCH MORE EASILY PROVEN "KNOWING" STANDARD IS AVAILABLE.

MS. DUPAIX: ACTUALLY, I'M NOT SO SURE THAT "KNOWING" IS THAT MUCH EASIER TO PROVE. "INTENTIONAL" IN MOST OF THESE CASES IS EASY TO PROVE BECAUSE YOU HAVE A DEFENDANT WHO IS SHOOTING SOMEBODY POINT BLANK. OR, LIKE TIMOTHY MCVEIGH, PARKING A FERTILIZER – BECAUSE YOU CAN INFER "INTENT"

FROM THAT AS WELL AS "KNOWING" IRRESPECTIVE OF WHAT HE SAYS. SO MY POINT IS IS THAT HE'S AWARE AS OPPOSED TO "INTENT" – I DON'T THINK THAT "KNOWING" IS ANY EASIER TO PROVE THAN "INTENT." IT DEPENDS ON THE CIRCUMSTANCES OF THE CASE. AND WHEN YOU READ THE STATUTE IT SAYS, "INTENTIONAL OR KNOWING." THE TWO INTENTS ARE REALLY, AS JUSTICE STEWART POINTS OUT, ALMOST OF A PIECE.

JUSTICE NEHRING: IT'S EASIER IN THIS CASE, IS IT NOT? ISN'T THAT YOUR ARGUMENT THAT IT – HAVEN'T YOU CONCEDED THAT IT'S – IT'S A HIGHER BAR – THAT "INTENT" IS A HIGHER BAR THAN "KNOWING?"

MS. DUPAIX: IT'S NOT THAT IT'S A HIGHER BAR, IT'S JUST A DIFFERENT INTENT. AND THAT THE FACTS TEND TO SHOW "KNOWING" MORE THAN IT SHOWS "INTENT." BUT THE BAR ISN'T REALLY HIGHER. YOU STILL HAVE TO PROVE BEYOND A REASONABLE DOUBT THAT HE'S AWARE THAT HIS CONDUCT IS REASONABLY CERTAIN TO CAUSE THE RESULT. THAT'S THE SAME, REALLY, BURDEN THAT THE STATE BEARS IN ANY CASE WHEN YOU [40] HAVE TO PROVE THAT THE DEFENDANT ACTUALLY INTENDED OR HAS – HAD AS HIS CONSCIOUS RESULT THE DEATH. I – I JUST REALLY DON'T THINK IT'S A HIGHER BAR. I THINK IT'S ALMOST THE SAME THING, EXCEPT THAT YOU HAVE TO LOOK AT THE FACTS AND CIRCUMSTANCES OF EACH CASE AND WHAT ARE THE REASONABLE INFERENCES THAT COME FROM THAT? AND OUR ONLY POINT IS, IN THIS CASE, IF THERE'S A QUESTION ABOUT WHETHER HE HAD AS

HIS CONSCIOUS OBJECTIVE TO KILL ARNETT, THERE'S REALLY NO QUESTION THAT AT – AT LEAST FOR BIND-OVER PURPOSES – THAT HE IS AWARE THAT HIS CONDUCT WOULD BE REASONABLY CERTAIN TO CAUSE ARNETT'S DEATH IN THIS CASE. SO I DON'T THINK IT'S EASIER. I THINK THAT JUST HAPPENS TO BE THE STATUS OF THIS CASE.

I SEE MY TIME IS UP. IF THERE ARE NO MORE . . .

JUSTICE WILKINS: I HAVE – I HAVE ANOTHER QUESTION.

MS. DUPAIX: YES.

JUSTICE WILKINS: AS A MATTER OF PRACTICE, WHEN, UH, CHARGING DECISIONS ARE MADE, DO THEY CHARGE, UH, "INTENTIONALLY" OR "KNOWINGLY" OR DO THEY CHARGE "INTENTIONALLY OR KNOWINGLY?"

MS. DUPAIX: I'VE ALWAYS SEEN JUST THE WORDS "INTENTIONALLY OR KNOWINGLY."

JUSTICE WILKINS: WELL THAT WAS MY EXPERIENCE.

MS. DUPAIX: EVERY INFORMATION I'VE SEEN TAKES IT [41] OUT OF THE STATUTE.

JUSTICE WILKINS: YEAH.

MS. DUPAIX: I CAN'T IMAGINE THERE BEING AN INFORMATION THAT SAYS – THAT CHARGES HIM JUST WITH "KNOWINGLY" BUT NOT "INTENTIONALLY" OR "INTENTIONALLY" WITHOUT "KNOWINGLY." IT – IT SEEMS TO ME A PROSECUTOR

IS GOING TO HEDGE HIS BETS AND SEE IF HE CAN PROVE BOTH.

JUSTICE WILKINS: WELL – AND THERE'S NO PROHIBITION OF THAT, IS THERE? I MEAN, YOU JUST CITE THE STATUTORY LANGUAGE.

MS. DUPAIX: NO. I DON'T THINK THERE'S ANY PROHIBITION FOR IT.

THANK YOU.

CHIEF JUSTICE DURHAM: THANK YOU VERY MUCH.

DID YOU RESERVE ANY, UH, ADDITIONAL TIME FOR A REPLY ON THE CROSS-APPEAL?

MR. KINDOPP: I DID NOT.

CHIEF JUSTICE DURHAM: ALL RIGHT.

THANK YOU VERY MUCH, COUNSEL. WE APPRECIATE THE ARGUMENT THIS AFTERNOON. WE WILL TAKE THE CASE UNDER ADVISEMENT AND THE COURT WILL BE IN RECESS.

BAILIFF: . . . COURT WILL PLEASE RISE. COURT IS ADJOURNED.

(RECORDING ENDS.)

– – –

[42] CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT WAS PREPARED BY ME AND REPRESENTS A COMPLETE, TRUE, AND ACCURATE TRANSCRIPT OF THE UNDERSTANDABLE PORTIONS OF

THE TAPE RECORDING TO THE BEST OF MY ABILITY.

DATED: OCTOBER 30, 2006.

/s/ Evan P. Hennessey
EVAN P. HENNESSEY

(Received Oct. 21, 2005)

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellant-Cross Appellee,	:	
v.	:	Case No. 20050046-SC
SEAN GRAHAM, Defendant/Appellee-Cross Appellant	:	

BRIEF OF APPELLEE/CROSS-APPELLANT

AN INTERLOCUTORY APPEAL FROM AN ORDER PARTIALLY QUASHING THE BINDOVER IN AN AGGRAVATED MURDER PROSECUTION, IN THE FIFTH JUDICIAL DISTRICT COURT, IRON COUNTY, UTAH, THE HONORABLE G. MICHAEL WESTPHALL PRESIDING

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellant-Cross Appellee,	:	
v.	:	Case No. 20050046-SC
SEAN GRAHAM, Defendant/Appellee-Cross Appellant	:	

BRIEF OF APPELLEE/CROSSAPPELLANT

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This Court granted the State's and Defendant's respective petitions for permission for interlocutory appeal

in order for this Court to review the "Findings of Fact and Order Granting Defendant Sean Graham's Motion to Quash Amended Information; and, Bind-Over Order." R746-41.

This Court has jurisdiction over interlocutory appeals involving a first degree or capital felony. Utah Code Ann. § 78-2-2(3)(h); Utah R.App. P. 5.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The pertinent statutes are attached as Addendum A to Appellant's Brief.

STATEMENT OF THE CASE

Seventeen-year-old co-defendants Sean Graham (Defendant) and Jesse Simmons (Simmons) were charged with aggravated murder, a capital offense (U.C.A. § 76-5-202)[1]; aggravated kidnapping, a first degree felony (U.C.A. § 76-5-301); theft of an operable motor vehicle, a second degree felony (U.C.A. § 76-6-404); and theft, a class A misdemeanor (U.C.A. § 76-6-404). R4-2; R169:11-12. On the prosecutor's motion, the magistrate reduced the theft charge from a class A to a class B misdemeanor. R169:211-12. The

[1] The State initially sought the death penalty. The United States Supreme Court has since held it violates the Eighth and Fourteenth Amendments to execute persons who were under 18 years old when they committed their capital murders. *See Roper v. Simmons,* 125 S.Ct. 1183 (2005). Thus, if convicted of aggravated murder, the defendant could be sentenced to an indeterminate prison term of 20 years to life or to life without the possibility of parole. *See* Utah Code Ann. § 76-3-206(1) (West 2004).

State charged four aggravating circumstances, thereby elevating the murder to aggravated murder:

(1) The homicide was committed while the actor was engaged in the commission of a kidnapping. U.C.A. § 76-5-202(1)(d);

(2) The homicide was committed for the purpose of effecting the defendant's or another's escape from lawful custody. U.C.A. § 76-5-202(1)(e);

(3) The homicide was committed for pecuniary or other personal gain. U.C.A. § 76-5-202(1)(f)[2]; and,

(4) The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner. U.C.A § 76-5-202(1)(p). R4-3.

Bindover Order. After a joint preliminary hearing, the magistrate bound both Defendants over on all counts. R166-63; R174:13-21. The Defendant was bound over for aggravated murder on a theory of accomplice liability because he aided Defendant Simmons in the conduct which resulted in the death of the victim. (R166-163; R174:13-15).

Motion to Quash Bindover Order. On September 16, 2004, Defendant filed a motion to quash the amended information. R224-23; R270-28; R738:26-27.

On November 15, 2004, a hearing was held on the motion. R738. At the hearing, the State contended the kidnapping commenced upon the victim being hit in the head by Defendant Simmons. R738:9.

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[2] Utah Laws 2005, c. 143, rewrote Utah Code Ann. § 76-5-202, and re-lettered subdivision (f) as subdivision (g).

On December 28, 2004, the District Court filed the "Findings of Fact and Order Granting Defendant Sean Graham's Motion to Quash Amended Information; and, Bind-Over Order" (hereinafter referred to as "Order Quashing Amended Information"), thereby partially granting Defendant's motion to quash the amended information. R746-41. (See Addendum C to Appellant's Brief). Iron County Attorney Scott Garrett approved the form and content of the Order Quashing Amended Information. R746-41.

Based its findings, the court: (1) quashed the bind over order as to aggravated murder (U.C.A. § 76-5-202); (2) refused to bind Defendant over for second degree murder under the felony murder rule (U.C.A. § 76-5-203, subdivision (2)(d)); (3) bound Defendant over for second degree murder under U.C.A. § 76-5-203, subdivisions (2)(b) and (2)(c); and, (4) bound Defendant over for kidnapping (U.C.A. § 76-5-301) and aggravated kidnapping (U.C.A. § 76-5-302). R746:42-41.

STATEMENT OF FACTS

In June of 2003, Defendant's parents voluntarily placed him in the Maximum Life Skills Academy ("Academy") (R169:176) pursuant to an "Enrollment Agreement." R169:169, 176. Michael Ahquin, the Academy Director, testified the agreement provided the Academy with "guardianship" of the Defendant. R169:169. He was not free to leave (R169:170) unless he was released to his parents, the contract is terminated, or he graduated. R169:170, 175-176. The Defendant was not ordered to attend the Academy by any Court (R169:176, 178) and *no* evidence was presented that he was in the actual or

constructive custody of any youth correctional facility, jail, prison, or any other penal institution. The Defendant was scheduled to go home on March 4, 2004 (R169:149) but he, and Simmons had been caught cheating on a test (R169:172) which prolonged their stay. R169:149. They were also being watched because one of the staff had heard them talking about running away. R169:139. Although the Academy had planned to release them, Jake Truman, a youth counselor at the Academy (R169:136-137), believed the parents wanted them to remain. R169:149. The decision as to whether a juvenile leaves the Academy is usually up to the parents. R169:149.

On the date of the homicide (March 8, 2004), there were six boys at the Academy: Jessie Katches ("Katches"), Nick Relich ("Relich"), Steven Kim ("Kim"), Satchell, Simmons, and Defendant. R169-189, 59. They were on a "shut down" or "lock down." R169:138. When the Academy is in "lock down", "pretty much all privileges are revoked." R169:155. The residents basically sit at a desk (R169:155) and are not allowed to participate in any activities or interact with one another. R169:59:5-8; 155:19. Relich and Kim slept downstairs (R169:22, 59) while Satchell, Katches, Simmons and Defendant slept in the upstairs living room. R169:138-139.

Around 8:00 p.m., Satchell and Katches were getting ready for bed. R169:18, 88. They were lying on the floor about three feet apart (R169:43) and parallel to each other, facing the same direction. R169:91. Satchell was facing the coat closet (R169:45-46, 68) and "had a clear view of the top of the stairs, closet and a little down the office area." R169:46, 69. Satchell testified Simmons and Defendant "were beyond the wall so it was kind of hard to see if they were doing anything [. . .]" R169:23. They were lying

right next to each other (R169:43-44) facing in the same direction as Satchell and Katches (R169:91) toward the stairs (R169:91) with their feet about two feet from Satchell's head (R169:44). The wall is about four feet high (R169:46) and stretches from the top of the stairs back to the end of the room. R169:46.

At about 9:00 p.m. (R169:21) the victim ("Arnett") came on duty. Two staff were leaving (R169:89) and Arnett began setting up near an upstairs closet. R169:23. He was the only staff on duty. R169:21. Satchell and Katches were talking (R169:23) and Simmons and Defendant were whispering. R169:23, 46. Arnett got angry because they were not supposed to be talking. R169:23. He yelled something like: "Be quiet"; "Its time to go to bed"; or, "Time to go to sleep." R169:45. Satchell and Katches stopped talking and got into bed. R169:23:9-10. About 10 minutes after starting work (R169:23-25), Arnett went downstairs (R169:24) to check the rooms and arm the alarm. R169:89. Simmons and the Defendant stopped talking (R169:93) and Defendant got up and crouched down (R169:24, 93) against a wall facing downstairs. R169:93-94. Katches said Defendant could look down the stairs and at Simmons. R169:94. Simmons and Defendant were in those locations for about a minute before Arnett came back up the stairs. R169:48.

As Arnett ascended the stairs Simmons pulled a baseball bat out from under his sheets. R169:25, 49, 71. Satchell did not know the bat was there (R169:25) and had not seen it that day. R169:71. The "[Defendant] kind of glanced over to [Simmons]" (R169:95, 113) "when [Arnett] was comin' up the stairs, ah, just about when [Arnett]'s head was visible to me, [Simmons] stood up and he pulled a bat from the side of his bed. And he stood up and hit

[Arnett] in the back of the head." R169:93. Nothing was said between Simmons and Defendant (R169:72) prior to Simmons swinging the bat. R169:94-95. Arnett fell toward the wall facing the stairs. R169:95. He fell by the desk (R169:125) and dropped his keys to the house and van (R169:25, 50, 72), which he did not pick up. R169:25. Although Satchell thought Defendant picked the keys up right after Arnett walked away (R169:50), Katches testified he did not see Arnett drop the keys. R169:114. After Arnett fell, Simmons and Defendant stood up and Simmons put the bat back by his bed. R169:96-97. When Arnett stood up he grabbed his head (R169:96) and "was kind of moaning" and did not seem to know what had happened. R169:25-26. Simmons and Defendant said something like: "Are you okay?", "What happened?", or, "Did you trip?" R169:26, 96. Arnett walked into the office and shut the door. R169:28, 96. He was in the office "for about three to four minutes." R169:27. When he "went into the office, [Defendant] looked at [Simmons] and said, 'Why didn't you knock him out the first time?' You know, somethin' like that." R169:27. When Arnett came out of the office he went downstairs and outside. R169:27.

When Katches heard Arnett come back in the front door, Simmons and Defendant "crouched back down toward where they were." R169:98, 117. Defendant was "against this wall like he was before" (R169:98) and looking down the stairs. R169:98-99. Simmons was "doing the exact same thing as before. Crouching, facing this way kinds [. . .]" behind the wall with the bat in his hands. R169:28, 99. Simmons and Defendant did not talk during this time. R169:28; 97, 98. Defendant glanced over at Simmons as Arnett came up the stairs, (R169:117) and Simmons "took the bat up and [. . .] hit him" (R169:99) in the back of the

head. R169:28. After Arnett was hit a second time, he fell to the floor and started convulsing. R169:28. He fell "no more than two to three feet – three feet from the closet" (R169:81) which "[. . .] is literally right there at the top of the stairs." R169:81. Simmons and Defendant grabbed Arnett by the legs and upper torso (R169:101:7-8) and placed him in the closet (R169:29) on his back (R169:77) with his legs up in the air (R169:77) over his head (R169:101) and against a cabinet. R169:78. His head was on the floor next to the wall (R169:30, 77) "on the left [. . .] bottom corner and his feet were over on the right side." R169:101. Arnett was moved two to three feet "at the most" to the closet from where he fell on the floor. R169:131. Katches view was unobstructed (R169:99). Katches never saw Defendant strike Arnett or swing the bat. R169:110. Satchell was surprised at what happened (R169:33), but did nothing to stop it. R169:33. After Arnett was put in the closet, Simmons and Defendant locked the closet (R169:101), collected their belongings (R169:31), and drove off in the Academy's van. R169:32:18-19, 102:25.

After Simmons and Defendant left the Academy, Satchell and Katches tried to open the closet door but could not do so because it was locked. R169:34. They tried to call for help but could not do so because the phone lines had been cut. R169:33-34, 104. Satchell and Katches ran to the home of the director of the Academy (who was not at home) and then to the home of a counselor, Jake Truman, for help. R169:34-38, 106, 140, 157. Truman and the boys drove back to the Academy. R169:106, 141-142. Truman used a kitchen knife to open the closet door. R169:106, 141-142. Truman called 911 on his cell phone. R169:142, 146. Truman removed Arnett from the closet. (R169:150) and stayed with Arnett until the EMT's arrived. R169:151.

Arnett died the following day on March 9, 2004 at 7:20 p.m. as a result of his having sustained blunt force trauma to his head. R169:188:1-3; 192:2-4.

On the evening of March 9, 2004, Simmons and Defendant were apprehended by law enforcement in Las Vegas, Nevada. R169: 201.

The prosecution did not present any evidence at the preliminary hearing to prove: Arnett died because he was placed in the closet, or, the manner in which he was placed in the closet caused or contributed to his death (R169); or, Arnett would *not* have died if he immediately received medical treatment or was unable to immediately receive medical treatment because the phone lines were cut and/or the closet door was locked. R169.

SUMMARY OF APPELLEE'S ARGUMENT

Appellant's Issue No. 1: "Was there sufficient evidence presented at the preliminary hearing to support a reasonable belief that Defendant, as an accomplice, 'intentionally or knowingly' killed the victim?"

Summary of Defendant's Response to Issue No. 1: First, the trial court correctly found that the prosecution did *not* present sufficient evidence to sustain a finding that the Defendant intentionally or knowingly caused the death of Arnett within the meaning of U.C.A. § 76-5-202(1)." R746:45-44.

Second, portions of the Order Quashing Amended Information, refer to the requisite mental state for aggravated murder as "specific intent". R746:745-744. However, the content of the Order was approved by the Iron County

Attorney prior to its submission to the court for filing. R746:41. Hence, the State not only failed to object to the use of the term "specific intent" to describe the requisite mental state for aggravated murder, but the State approved of the use of this term. Therefore, the State waived any irregularity or impropriety in the use of this term and should not be able to raise this issue on appeal.[3]

Third, in order to be found liable as an "accomplice" to aggravated murder, a defendant must be found to have "intentionally aided" the principal in the commission of an aggravated murder. The prosecution did *not* present sufficient evidence the Defendant provided aid to Simmons with the intent that Simmons kill Arnett. U.C.A. §§ 76-2-202; 76-5-202.

Fourth, in order to commit the crimes of kidnapping and aggravated kidnapping, the perpetrator necessarily possesses the intent to keep his victim alive, at least for a short period of time. U.C.A. §§ 76-5-301, 76-5-302; *State v. Couch,* 635 P.2d 89, 93 (Utah 1981). Conversely, in order to commit the crime of aggravated murder, the perpetrator must possess the intent to kill when he performs the act that causes the death of another. U.C.A. § 76-5-2021). Therefore, a perpetrator cannot *simultaneously* possess the intent to kidnap and the intent to kill when performing an act that *simultaneously* causes the detention or restraint and the death. The two mental states are necessarily inconsistent and mutually exclusive.

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[3] *State v. Jones,* 2002 UT 1, ¶ 7, 44 P.3d 658; *State v. Olsen,* 860 P.2d 332, 335 (Utah 1993); *State v. DeMille,* 756 P.2d 81, 83 (Utah 1988); *State v. Miller,* 674 P.2d 130, 131 (Utah 1983); *State v. Lopez,* 886 P.2d 1105, 1103 (Utah 1994).

In the case at bar, when Defendant Simmons hit Arnett with the bat, knocking him unconscious, a kidnapping and/or aggravated commenced because that is the act that resulted in the detention or restraint of Arnett against his will.[4] At that point in time, Defendant, as the accomplice of Simmons, must have either intended for Simmons to merely knock Arnett unconscious so that they could leave the Academy, or, for Simmons to kill Arnett so that they could leave the Academy. Defendant could not have *simultaneously* possessed both the intent to kidnap and the intent to kill.

Appellants Issue No. 2: "Was there sufficient evidence presented at the preliminary hearing to support a reasonable belief that the homicide was committed while Defendant was engaged in a kidnapping?"

Summary of Defendant's Response to Issue No 2: The trial court properly found the homicide was *not* committed while Defendant was engaged in the commission of a kidnapping or aggravated kidnapping within the meaning of U.C.A. § 76-5-202(1)(d). Therefore, the trial court properly quashed the bind over order as to the charge of aggravated murder. R744:43. This Court should *not* reverse the trial court.

First, the State improperly raises new issues for the first time on appeal. The State is now contending, for the first time on appeal, that the trial court should have denied the Defendant's motion to quash the amended information as to the charge of aggravated murder because the kidnapping

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[4] *State v. Couch*, 635 P.2d 89, 93 (Utah 1981).

and/or aggravated kidnapping and the homicide constitute a "continuity or action over a span of time" and/or a "continuous interrelated transaction." The State did *not* make this argument below (R174, R738, R477-451); and, the State did *not* raise this particular issue in its "Petition for Permission to Appeal Interlocutory Order".[5] Therefore, the State is precluded from raising this issue for the first time on appeal.[6]

Second, the prosecution did not present sufficient evidence for the trial court to find probable cause to believe Defendant committed the crimes of kidnapping or aggravated kidnapping within the meaning of U.C.A §§ 76-5-301 or 76-5-302; and, therefore, the aggravating circumstance under U.C.A. § 76-5-202(1)(d) was *not* present.

Third, assuming arguendo the prosecution presented sufficient believable evidence the Defendant committed the crime of kidnapping or aggravated kidnapping, the trial court properly determined the homicide did *not* occur *while* Defendant *was engaged in* the commission of a kidnapping or aggravated kidnapping within the meaning of U.C.A. § 76-5-202(1)(d). The State's argument concerning the close temporal proximity between the commission of the kidnapping and/or the aggravated kidnapping is erroneous because the kidnapping must be in progress *prior to* the commission of the act that causes the death of

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[5] *State v. Lusk*, 2001 UT 102, ¶ 32, 37 P.3d 1103; *State v. Reed*, 1999 UT 108, ¶ 9, 992 P.2d 986; *State v. Potter*, 860 P.2d 952, 960 (Utah App. 1993) (dissenting opinion).

[6] *State v. Jones*, 2002 UT 1, ¶ 7, 44 P.3d 658; *State v. Olsen*, 860 P.2d 332, 335 (Utah 1993); *State v. DeMille*, 756 P.2d 81, 83 (Utah 1988); *State v. Miller*, 674 P.2d 130, 131 (Utah 1983); *State v. Lopez*, 886 P.2d 1105, 1103 (Utah 1994).

another. Otherwise, the act that causes the death does *not* occur *while* the Defendant *is engaged in* the commission of the homicide. Hence, Defendant could *not* have been *engaged in the commission of* a kidnapping because the same act that commenced the alleged kidnapping is the same act that caused Arnett's death.

The State also argues that the homicide occurred while Defendant was engaged in the commission of a kidnapping because the homicide was not complete until the following day when Arnett died, which is after the kidnapping had commenced. This argument is fundamentally flawed for the same reason as set forth immediately above; and, because the kidnapping had ended when Arnett was removed the closet. Hence, the kidnapping would have concluded prior to the death of Arnett; and, therefore, the Defendant would *not* have been *engaged in the commission of* a kidnapping when Arnett died.

Fourth, the acts alleged to constitute a kidnapping and/or aggravated kidnapping in this case were incidental to and inherent in the commission of the homicide. Every homicide necessarily involves a detention or restraint against the will of the victim. However, not every homicide victim is kidnapped. Otherwise, every homicide would automatically constitute an aggravated murder pursuant to U.C.A. § 76-5-202(1)(d).

Here, the detention or restraint of Arnett was necessarily inherent in the commission of the homicide; and, the movement of Arnett less than three (3) feet after he fell to the floor was slight, inconsequential, and incidental to the commission of the homicide. Therefore, Defendant cannot be convicted of both murder and kidnapping or aggravated kidnapping. Consequently, he should *not* have been bound

over for both murder and kidnapping or aggravated kidnapping.

Appellant's Issue 3: Was there sufficient evidence presented at the preliminary hearing to support a reasonable belief that defendant committed the alternative crime of felony murder?

Summary of Defendant's Response to Issue No. 3: The trial court was correct in *not* binding Defendant over on a charge of felony murder (U.C.A. § 76-5-203(2)(d)) based on its having found the homicide did *not* occur when Defendant was *engaged in the commission of* a kidnapping or aggravated kidnapping. R742. The trial court's ruling as to the inapplicability of the felony murder rule is consistent with its ruling as to the inapplicability of kidnapping or aggravating kidnapping as an aggravating circumstance under U.C.A. § 76-5-202(1)(d).

DEFENDANT'S ARGUMENT

STATE'S POINT 1

A. The State Waived Its Ability to Argue the Issue of Mens Rea for Aggravated Murder by Approving the Use of the Term "Specific Intent" and by Not Raising the Issue in the Trial Court.

The State contends the trial court used the wrong mens rea for aggravated murder due to the use of the term "specific intent" in the Order Quashing Amended Information. R746-41. The State's contention is without merit for three reasons: (1) the trial court applied the correct 'mens rea for the crime of aggravated murder; (2) the State approved the use of the term "specific intent" in order to describe the mens rea for aggravated murder, thereby

waiving its right to argue this issue on appeal; and, (3) the State did not raise this issue in the trial court, thereby waiving its right to argue this issue on appeal.

1. The trial court applied the correct mens rea.

In the Order Quashing Amended Information, the trial court actually found "there was insufficient evidence presented at the preliminary hearing to sustain a finding there was probable cause to believe the Defendant SEAN GRAHAM *intentionally or knowingly* caused the death of Anson Arnett within the meaning of U.C.A. § 76-5-202). R746:45-44, emphasis added. This finding directly conflicts with the State's contention the trial could applied an erroneous mental state. Therefore, the State's assertion that trial court applied the wrong mens rea is without merit.

2. The State approved the use of the term "specific intent" and, therefore, waived its right to challenge this issue on appeal.

It is a well settled rule of law that failure to object to a purported error in the trial court constitutes a waiver of the objection on appeal. *State v. Jones,* 2002 UT 1, ¶ 7, 44 P.3d 658; *State v. Olsen,* 860 P.2d 332, 335 (Utah 1993); *State v. DeMille,* 756 P.2d 81, 83 (Utah 1988); *State v. Miller,* 674 P.2d 130, 131 (Utah 1983); *State v. Lopez,* 886 P.2d 1105, 1103 (Utah 1994).

In addition to using the terms "intentionally" and "knowingly" when referring to whether Defendant had the intent to kill Arnett, the Order Quashing Amended Information also uses the term "specific intent". R746:45-43. The State approved the **form and *content*** of the Order

prior to its having been presented to the trial court for signature and filing. R746-41, emphasis added. Furthermore, on November 15, 2005, at the hearing on Defendant's Motion to Quash the Amended Information, the State's attorney acknowledged that an essential element of aggravated murder is the specific intent to kill. R738:5-6.

The State approved the trial court's use of the term "specific intent" as a term to describe the requisite mental state for aggravated murder in the trial court. Therefore, the State is precluded from arguing on appeal that the trial court's use of this term was erroneous.

3. The State did not raise the issue as to there being a difference in the mens rea for aggravated murder based on the wording U.C.A. § 76-5-202(1) (i.e. "intentionally or knowingly") in the trial court and, therefore, the State is precluded from doing so for the first time on appeal.

It is a well settled rule of law that a party will be precluded from raising an issue for the first time on appeal. *State v. Jones,* 2002 UT 1, ¶ 7, 44 P.3d 658; *State v. Olsen,* 860 P.2d 332, 335 (Utah 1993); *State v. DeMille,* 756 P.2d 81, 83 (Utah 1988); *State v. Miller,* 674 P.2d 130, 131 (Utah 1983); *State v. Lopez,* 886 P.2d 1105, 1103 (Utah 1994).

On June 9, 2004, a hearing was held at the conclusion of the preliminary hearing. R174. At the hearing, the State's attorney acknowledged that in order for the Defendant to be bound over for aggravated murder, the State was required to present sufficient, believable evidence that

Defendant knowingly ***and*** intentionally caused the death of Arnett. R174:8.

On November 15, 2005, a hearing was held on Defendant's Motion to Quash the Amended Information. R738. At that hearing, the State's attorney acknowledged that an essential element of aggravated murder is the specific intent to kill. R738:5-6.

In the briefs filed by the State in the trial court, the State merely set forth the language of the aggravated murder statute. R110-09, R 469-65, 454. The State did *not* argue it had the option of proving one of two different mental states in order to obtain a bind over order for aggravated murder. To the contrary, the State acknowledged on numerous occasions that for the trial court to issue a bind over order on the charge of aggravated murder, the State had to present sufficient evidence the Defendant had the specific intent to kill Arnett.

Despite the foregoing, the State now contends for the first time on appeal, that there are two different mental state's that are applicable when a person is charged with aggravated murder, to wit, "intentionally" or "knowingly". U.C.A. § 76-5-202(1). According to their argument, the term "intentionally", as used in the aggravated murder statute, means a defendant willfully engaged in conduct with the conscious objective or desire to cause the death of another. U.C.A. § 76-2-103(1). The State also argues that the term "knowingly", as used in the aggravated murder statute, means the defendant was aware of the nature of his conduct and the existing circumstance and that his conduct was reasonably certain to cause the death of another. U.C.A. § 76-2-103(2). The State further contends it is not required to prove a defendant intended to cause

the death of another in order to obtain a conviction for aggravated murder. The State actually contends that it can convict a person of aggravated murder, a capital offense, without proving that the person actually intended to kill another person; and, the death penalty can be imposed even though a defendant did not possess the subjective intent to kill another person. The State's contention is incredible.

Regardless of the substantive problems inherent in the State's position, the State took the opposite position in the trial court, and thereby waived its right to argue this issue on appeal; and, this issue was *not* preserved in the trial court. Therefore, the State is precluded from raising this issue on appeal. *State v. Jones,* 2002 UT 1, ¶ 7, 44 P.3d 658; *State v. Olsen,* 860 P.2d 332, 335 (Utah 1993); *State v. DeMille,* 756 P.2d 81, 83 (Utah 1988); *State v. Miller,* 674 P.2d 130, 131 (Utah 1983); *State v. Lopez,* 886 P.2d 1105, 1103 (Utah 1994).

B. An Essential Element of Aggravated Murder Is the Intent to Cause the Death of Another.

"Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide." U.C.A. § 76-5-201(2). "A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being. . . ." U.C.A. § 76-5-201(1)(a)). "Criminal homicide constitutes aggravated murder if the actor . . . intentionally or knowingly causes the death of another

under any of the following circumstances: . . . ." U.C.A. § 76-5-203(1). "Criminal homicide constitutes murder if:

> (a) the actor intentionally or knowingly causes the death of another;
>
> (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
>
> (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
>
> (d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;" U.C.A. § 76-5-203(2)

The terms "intentionally" and "knowingly" are generically defined in U.C.A. § 76-2-103(1) and (2), as follows:

> "A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

Based on its interpretation of the foregoing statutes, the State contends it is only required to prove a person

"intentionally *or* knowingly" caused the death of another in order to obtain a conviction for aggravated murder. Stated another way, according to the State, it is *not* required, to prove the defendant acted both intentionally *and* knowingly in causing the death of another. The State's position is erroneous for several reasons.

First, if the State's position were correct, the State would *not* have to prove the defendant acted "intentionally" when engaging in an act that caused the death of another in order to obtain a conviction for aggravated murder.[7] The State would only have to prove the defendant acted "knowingly" when engaging in an act that caused the death of another.[8] The State's position is contrary to numerous published appellate cases that provide that the State must prove that the defendant "intentionally ***and*** knowingly" caused the death of another in order to obtain a conviction for aggravated murder.

In *State v. Pierre*, 572 P.2d 1338, 1354, (Utah 1977), the Supreme Court of Utah explained the critical difference between first and second degree murder is that first degree murder requires a "conjoining of" "intentionally *and* knowingly" with enumerated acts, which is not required for second degree murder, as follows:

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[7] According to the State, "intentionally", within the meaning of the aggravated murder statute, means the defendant acted "with a conscious objective or desire to cause the death of another." U.C.A. § 76-2-103(1).

[8] According to the State, "knowingly", as used in the aggravated murder statute, means the defendant was aware of the nature of his conduct or the existing circumstances and that his conduct was reasonably certain to cause the death of another. U.C.A. § 76-2-103(2).

> "**The critical difference between murder in the first and second degrees is that the former requires the actor to cause intentionally *and* knowingly the death of another** under aggravated circumstances while the latter requires an intentional *and* knowing death or the commission of listed acts of aggravation which cause death or recklessness with a depraved indifference to human life which eventuates in death. **First degree murder in brief requires a conjoining of "intentional *and* knowing" with enumerated acts but second degree murder is specified in the disjunctive, thereby not requiring this union.**" Bold and italic emphasis added.

In *State v. Shaffer,* 725 P.2d 1301, 1313 (Utah 1986), the Supreme Court of Utah explained that "[f]irst degree murder requires proof of a statutorily defined aggravating circumstance in addition to an intentional *and* knowing killing." Italic emphasis added.

In *State v. Tuttle,* 780 P.2d 1203, 1215 (Utah 1989), the Supreme Court of Utah explained that "Section 76-5-202(1)(q) provides that a knowing *and* intentional killing is first degree murder and is punishable by the death penalty, ..." Italic emphasis added.

In *State v. Johnson,* 740 P.2d 1264, 1266 (Utah 1987), the Supreme Court of Utah explained that "[s]ection 76-5-202(1)(c) and (d) elevate a knowing *and* intentional killing to first degree murder when: . . . ." Italic emphasis added. Later, in *State v. Johnson, supra,* the Court once again stated that a violation of section 76-5-202(1) requires proof of an intentional *and* knowing killing, as follows: "We disagree, however, with defendant's assertion that his conduct did not come within the aggravating circumstances described in Utah Code Ann. § 76-5-202(1)(d) (Supp.1986), which elevates a knowing *and* intentional

killing to first degree murder if the murder was committed 'while the actor was engaged in the commission of, or an attempt to commit ... rape ... or aggravated sexual assault.'" Italic emphasis added.

Hence, according to numerous published appellate decisions in Utah, section 76-5-202(1) requires that a defendant act both intentionally *and* knowingly when causing the death of another in order to be found guilty of aggravated murder.[9]

Second, if the State's position was correct, in most instances there would be little, if any, difference between the crimes of murder and aggravated murder.

In *State v. Fontana,* 680 P.2d 1042, 1047 (Utah 1984), the Court analyzed the culpable mental state for depraved indifference murder within the meaning of U.C.A. § 76-5-203(1)(c) and held the culpable mental state for depraved indifference homicide is that the defendant acted with knowledge that his conduct created a grave risk of death to another. *Fontana, supra,* at pp. 1046-1047. The Court

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[9] Similarly, in other jurisdictions the critical difference between first degree murder and second degree murder is the conscious objective or desire to kill, whether it be labeled as intentionally *and* knowingly, specific intent, premeditation and deliberation, deliberate, etc. See *Commonwealth v. DeHart,* 516 A.2d 656, 669 (Penn. 1986); *State v. Reese,* 259, N.W.2d 771, 778 (Iowa 1977); *Stokes v. Warden,* 306 S.E. 882, 885 (Virginia 1983); *Terrell v. State,* 285 N.W.2d 601, 603; *State v. Ferguson,* 270 S.E.2d 166, 170 (West Virginia 1980); *State v. Griffin,* 302 S.E.2nd 447, 451 (N. Carolina 1983); *State v. Valenzuela,* 559 P.2d 402, 407 (New Mexico 1976); *State v. Marvin,* 606 P.2d 406, 408 Arizona 1980); *People v. Sneed,* 514 P.2d 776, 778 (Colorado 1973); *People v. Vail,* 227 N.W.2d 535, 538 (Michigan 1975); *State v. Kerley* 696 P.2d 975, 977 (Kansas 1985); *State v. Seals,* 515 S.W.2d 481, 486 (Missouri 1974); *State v. Payne,* 289 N.W.2d 173, 177-178 (Nebraska 1980).

explained the difference between first degree murder and depraved indifference second degree murder is that **in order to be guilty of first degree murder the defendant must have the "'conscious objective' of causing the victim's death."** *Id.* at p. 1047, emphasis added.[10]

A proper interpretation of U.C.A. 76-5-202(1) requires that meaning be given to both of the words, "intentionally" *and* "knowingly," without omitting the requirement that a person acted with the conscious objective or desire to cause the death of another. The word "intentionally", as used in U.C.A. § 76-5-2021), means a person must act with the conscious objective or desire to cause the death of another. The word "knowingly", as used in U.C.A. § 76-5-202(1), means that a person must be subjectively aware of the risk posed by the nature of his conduct. Hence, in order to commit the crime of aggravated murder a person must be subjectively aware of the grave risk of death posed by the nature of his conduct ***and*** must act with the conscious objective or desire to cause the death of another. A person's awareness of his conduct is critical in that a person must subjectively understand, appreciate, and/or comprehend that the conduct in which he is engaging in is reasonably certain to accomplish his conscious objective (i.e. the death of another).

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[10] See also *State v. Powell*, 872 P.2d 1027, 1030 (Utah 1994) [the mens rea required for a conviction of depraved indifference murder does not require that the defendant have as his conscious objective or desire to cause the death of another; the circumstances under which the defendant acted are viewed objectively from the standpoint of a reasonable person and not subjectively from the state of such defendant's mind].

If the words "intentionally" and "knowingly", as used in U.C.A. § 76-5-202(1), are *not* read in the conjunctive (as opposed to a disjunctive standard proposed by the State), Utah's statutory structure of graded definitions of homicide will no longer exist. Based on the State's interpretation of "knowingly", as used in U.C.A. § 76-5-202(1), there would be no difference in the mens rea for depraved indifference murder and aggravated murder; and, often times there would be no difference between murder as defined by U.C.A. § 76-5-203(2)(B) and aggravated murder. The crimes would have the same mens rea in that they would, in essence, require that a person knowingly engage in conduct that was "reasonably certain" to cause the death of another.

If the State's position were adopted, the crimes of murder and aggravated murder would have an objective, as opposed to a subjective standard, with respect to the defendant's mental state. Under depraved indifference murder, the circumstances under which the defendant acted are viewed objectively, as opposed to subjectively (*Fontana, supra,* 680 P.2d at p. 1047) and the actual subjective mental state of the defendant is *not* taken into consideration. *Ibid.* According to the State's interpretation of U.C.A. § 76-5-202(1), the defendant's subjective mental state would *not* be taken into consideration for aggravated murder either. The State's interpretation of U.C.A. § 76-5-202(1), runs contrary to the common law meaning of first degree murder, the legislative intent in enacting the aggravated murder statutes, and decades of judicial interpretation of Utah's first degree murder statutes. Under the common law, the State had to prove beyond a reasonable doubt the defendant had the specific intent to kill in order to obtain a conviction for first degree murder.

State v. Dewey, 127 P. 275, 278-279 (Utah 1912); *State v. Stenbeck*, 2 P.2d 1050, 1053-1054 (Utah 1931); *State v. Trujillo*, 214 P.2d 626, 633-634 (Utah 1950).[11] In *State v. Castonguay*, 663 P.2d 1323, 1327, (Utah 1983), the Supreme Court of Utah used the term "specific intent" when describing the requisite mens rea that a defendant must possess in order to be found guilty of first degree murder.

Furthermore, if the State's disjunctive interpretation of U.C.A. § 76-5-202(1) were correct, the word "intentionally" in the statute would be mere surplusage in that the State's interpretation of the word "knowingly" creates a much lower standard of proof. The State would no longer need to prove that the murder was committed "intentionally", it would merely have to prove that the murder was committed "knowingly."

In *State v. Egbert*, 748 P.2d 548, 559 (Utah 1988), the Supreme Court of Utah explained "[i]t is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Egbert, supra*, 748 P.2d at p. 559, quoting *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979). This fundamental principal applies to substantive provisions of criminal statutes. *Ibid.* "A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Ibid.*

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[11] Criminal statutes are to be construed in light of the background rules of the common law in which the requirement of mens rea for a crime is firmly embedded. *Staples v. U.S.*, 511 U.S. 600, 605 (1994); *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978).

In *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972), the United States Supreme Court explained that vague criminal statutes violate basic principles of due process, as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

In *State v. Tuttle, supra,* 780 P.2d at 1216-1217 (Utah 1989), the Supreme Court of Utah explained that the 8th and 14th Amendments to the federal constitution require every state to "define the crimes for which death may be the sentence in a way that obviates standardless discretion." These criminal statutes must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Id.* at p. 1216. If a statutory scheme does not provide "a meaningful distinction between capital and noncapital murders", the statutory scheme will be unconstitutional under the federal constitution. *Id.* at p. 1217.

In *State v. Fedorowicz,* 2002 UT 67, ¶ 48, 52 P.3d 1194, 1206, the Supreme Court of Utah explained that

criminal laws must be written so there are *significant* differences between offenses and so that the same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge.[12]

Under the State's interpretation, a person of ordinary intelligence is not able to understand the difference between depraved indifference murder and aggravated murder. Further, a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited under the aggravated murder statute, so that he may act accordingly. Additionally, the State's interpretation of the aggravated murder statute does *not* provide explicit standards for those who apply them. To the contrary, under the State's interpretation, police, prosecutors, judges, and juries would be able to decide who will be prosecuted for aggravated murder, as opposed to depraved indifference murder, on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Finally, Defendant contends the State's interpretation of the means [sic] rea requirement of U.C.A. § 76-5-202(1) fails to provide a meaningful distinction between murder and aggravated murder and, therefore, the State's interpretation would necessarily result in a

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[12] In *People v. Marcy*, 628, P.2d 69, 73 (Colo. 1981), the Supreme Court of Colorado explained that criminal statues are required to provide an adequate definition of the act and mental state of each offense so that fair warning if given to all person concerning the nature of proscribed conduct and the penalties therefore. Furthermore, criminal statutes are required to differentiate on reasonable grounds the more serious from the less serious criminal conduct and prescribe penalties that are proportionate to the seriousness of the offense. *Ibid.* The equal protection clause of the 14th Amendment to the United States Constitution mandates a rationale and even handed application of the law. *Ibid.*

finding that Utah's aggravated murder statute is unconstitutional. *Tuttle, supra,* 780 P.2d at pp. 1216-1217.

This Court is required to interpret the aggravated murder statute in a manner that is consistent with state and federal law in order to avoid striking it down as unconstitutional. *Tuttle, supra,* 780 P.2d at p. 1217. The only manner in which the aggravated murder statute can be interpreted in order to avoid striking it down is to require the State to prove a defendant intentionally *and* knowingly caused the death of another (in addition to the presence of a valid aggravating circumstance).

C. In Order to Convict a Defendant of Aggravated Murder Based on Accomplice Liability, the State Must Prove that the Accomplice Specifically Intended the Principal to Cause the Death of Another.

The State contends when prosecuting a defendant for aggravated murder, it has the option of proving a defendant acted either "intentionally *or* knowingly" when causing the death of another. According to the State, the words "intentionally *or* knowingly" are disjunctive, and therefore proof of either will satisfy a conviction for aggravated murder.

The State cites *State v. Casey,* 2003 UT 55, 82 P.3d 1106, in support of its position. In *Casey, supra,* the Supreme Court of Utah held **in order to prove the crime of attempted murder the prosecution must prove the defendant had a *specific intent to kill.*** *Casey, supra,* 2003 UT 55, ¶ 23. In so holding, the Court analyzed the attempt statute (76-4-101) in conjunction with the second degree murder statute (76-5-203)(2)(a).

The Court was *not* analyzing the aggravated murder statute.

Furthermore, when Casey was decided, the attempt statute provided "a person is guilty of an attempt to commit a crime if, acting *with the kind of culpability otherwise required for the commission of the offense,* he engages in conduct constituting a substantial step toward commission of the offense." *Casey, supra,* 2003 UT 55, ¶ 18, fn. 5; *State v. Maestas,* 652 P.2d 903, 904 (Utah 1982).[13] The Court explained the statutes required the prosecution prove the defendant had a specific intent to kill in order to be found guilty of attempted murder because "there can be no difference between the intent required as an element of the crime of attempted first degree murder and that required for first degree murder itself." *Casey, supra,* 2003 UT 55, ¶ 18, fn. 5; *Maestas, supra,* 652 P.2d at p. 904.

In the case at bar, Defendant is accused of being an accomplice to aggravated murder. The accomplice statute (U.C.A. § 76-2-202) requires a mens rea that is very similar to the mens rea required for the crime of "attempt. The accomplice liability statute provides, as follows:

> "Every person, **acting with the mental state required for the commission of an offense** who directly commits the offense, who solicits, requests, commands, encourages, or **intentionally** aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for

[13] U.C.A. § 76-4-101 was amended effective May 3, 2004. See Laws 2004, c. 154, § 1, eff. May 3, 2004.

such conduct." U.C.A. § 76-2-202, bold and underline emphasis added.

However, the accomplice liability statute specifically requires the defendant not only act with the mental state required for the commission of the underlying offense, it also requires, that a person "intentionally" aid another. Therefore, the argument for specific intent in the context of this case (where the accomplice liability statute specifically requires the defendant intentionally aid another) is more compelling than the circumstances present in *Maestas, supra,* or *Casey, supra.*

According to the State, Defendant is liable as an accomplice under U.C.A. § 76-2-202 for the murder of Arnett, which was committed by Defendant Simmons. The State further contends that Defendant aided Simmons in that he signaled to Simmons when Arnett was ascended [sic] the stairs. However, the State was required to present sufficient evidence from which the trial court could find that Defendant had a conscious objective or desire that Simmons kill Arnett by striking him with the bat (i.e. "intentionally"); and, that Defendant had a conscious objective or desire that his signaling Simmons would aid Simmons in causing the death of Arnett (i.e. purposefully). In the absence of such evidence, the Defendant can not [sic] he bound over as n [sic] accomplice.

D. The Prosecution Did Not Present Sufficient Evidence that Defendant Possessed the Intent to Cause the Death of Arnett.

It is not necessary for the prosecution to prove by way of direct evidence that the defendant had the intent to kill.

State v. Watts, 675 P.2d 566, 569 (Utah 1983). The defendant's intent can be inferred from his conduct and the surrounding circumstances. *Ibid.* However, a defendant can intend to cause serious bodily injury to another without intending to cause death. *State v. Gaxiola,* 550 P.2d 1298, 1302 (Utah 1976).

In the case at bar, the trial court correctly found the prosecution did not present sufficient, believable evidence the Defendant intentionally or knowingly caused the death of Arnett. R746:45-744. The court found there was both direct and circumstantial evidence in support of its finding. R746:45-44.

The direct evidence was a statement made by Defendant at the scene of the incident, to wit, "Why didn't you knock him out the first time?" R169:27. The trial court correctly found this statement was direct evidence of Defendant's state of mind and was subject to only one reasonable inference, to wit, Defendant did not intend to cause the death of Arnett. R745-744. Defendant did *not* ask Simmons why he did not kill Arnett the first time he struck him; and, Defendant did *not* tell Simmons to hit Arnett harder the next time. The State's interpretation of Defendant's statement is unreasonable. The trial court was *not* willing to make unreasonable and illogical inferences from the evidence.

Additionally, the trial court found the circumstantial evidence leads to an inference that the Defendant did *not* intend to cause the death of Arnett, to wit: (1) the two blows were *not* struck in repeated or rapid succession; and, (2) after Arnett was incapacitated Defendant did *not* engage in any further activity to ensure the death of Arnett.

Contrary to the statements contained within the State's brief, there was no evidence presented by the State the placement of Arnett in the closet either caused or contributed to the cause of his death. R169. Moreover, there was no evidence presented by the State to the effect that had Arnett immediately received medical attention he would not have died as a result of his injuries. R169. Hence, the State's arguments concerning the placement and locking of Arnett in the closet and the cutting of the phone lines are irrelevant

Contrary to the State's assertions, the trial court correctly bound over Defendant on charges of second degree murder based on section 76-5-203(2)(b) and (c); and, *not* on charges of aggravated murder. The trial court made the only logical and reasonable inference it could from the evidence, to wit, Defendant did *not* possess the intent to kill.

STATE'S POINT 2

A. The Homicide Was *Not* Committed While Defendant Was Engaged in the Commission of a Kidnapping or Aggravated Kidnapping Within the Meaning of U.C.A. § 76-5-202(1)(d).

The State contends the trial court erred when it found that U.C.A. § 76-5-202(1)(d) did not apply to the facts of this case because the homicide did *not* occur *while the Defendant was engaged in the commission of a kidnapping* or aggravated kidnapping. More specifically, the State contends the court overlooked the fact that while the fatal blows were struck before the kidnapping has commenced and the homicide was not complete until Arnett died. Appellant's Brief, p. 23. Therefore, according to the State,

the homicide occurred while the Defendant was engaged in the commission of a kidnapping. The State relies on *State v. Archuleta,* 850 P.2d 1232 (Utah 1993) and *State v. Johnson,* 740 P.2d 1264 (Utah 1987) in support of its position.

Of significance, the State acknowledges neither a kidnapping nor an aggravated kidnapping where in progress at the time that Simmons struck Arnett with the bat.

There are two fundamental problems with the State's position. First, based on the plain language of the aggravated murder statute, the statutorily enumerated felony (i.e. kidnapping and/or aggravated kidnapping) must be in progress at the time of the commission of the act that causes the death of another. Second, the act that caused the death of Arnett occurred simultaneously with the act that commenced the alleged kidnapping, which is an inherent conflict in the requisite mental state for the crimes of aggravated murder and kidnapping, such that the Defendant can only intend to kill or kidnap Arnett, he cannot intend to do both. Consequently, the trial court was either required to find that Defendant had the intent to kill or he had the intent to kidnap.

1. The kidnapping must be in progress at the time that the defendant commits the act that causes the death of another.

In *State v. Germonto,* 2003 UT App. 217, ¶ 6, 73 P.3d 978, the Court set forth the rules of statutory construction, as follows:

> "In interpreting statutes, we first look to the plain language of the statute. [Citation omitted.] In considering the plain language of a statute, courts 'presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.' [Citations omitted.] We consider other methods of statutory construction only when a statute is ambiguous."

The statute, U.C.A. § 76-5-202(1)(d), is not ambiguous and, therefore, it should be interpreted considering its plain language. In looking at its plain language, it is evident that a homicide must occur *while the* defendant *is engaged in* the commission of a kidnapping. When comparing subdivision (1)(d) of the aggravated murder statute (U.C.A. § 76-5-202) with subdivision (2)(d) of the second degree felony murder statute (U.C.A. § 76-5-203), it is apparent that the italicized language *"the homicide was committed while* the actor is engaged in the commission *of"* is *not* present in the felony murder statute. This is significant because when this Court analyzes the aggravated murder statute, it is required to "'presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *State v. Germonto,* 2003 UT App. 217, ¶ 6, 73 P.3d 978. Therefore, it must be presumed the legislature intended to differentiate subdivision (1)(d) of the aggravated murder statute (U.C.A. § 76-5-202) from subdivision (2)(d) of the felony murder statute (U.C.A. § 76-5-203), by including the language *"the homicide was committed while* the actor is engaged in the commission *of"* in the aggravated murder statute. The logical and reasonable inference for the inclusion of the additional language within the aggravated murder statute was that the legislature intended to create a temporal requirement with respect to

the commission of the murder. The purpose of which would be to narrow the class of persons who could be convicted of aggravated murder and thereby subject to life imprisonment or the death penalty.

The cases relied upon by the State (*State v. Archuleta,* 850 P.2d 1232 (Utah 1993), and *State v. Johnson,* 740 P.2d 1264 (Utah 1987)) in support of its position are inapposite.

In *State v. Archuleta, supra,* 850 P.2d 1232, defendants (Archuleta and Wood) physically assaulted their victim, Church, and then bound him with tire chains and a bungee cord (*Id.* at p. 1236) and placed him in the truck [sic] of his own car. *Ibid.* Archuleta and Wood then proceeded to drive north from Cedar City toward Salt Lake City on Interstate 15. *Ibid.* After driving approximately 76 miles with Church in the trunk of the car, defendants pulled off the highway into a secluded area. *Ibid.* After removing him from the trunk, they attached battery cables to his testicles and to the car battery. *Ibid.* They beat Church severely on the head with a tire jack and tire iron (*Ibid*) and then inserted a tire iron into his rectum, forcing it eighteen inches into his body and puncturing his liver. *Ibid.* When Church was apparently dead, the defendants dragged his body up a hillside and attempted to cover his body with tree branches and dirt. *Ibid.* Church died as a result of a brain injury. *Ibid.*

A jury convicted defendant Archuleta of aggravated murder (*Id.* at p. 1235) and found the existence of the following aggravating circumstances: (1) kidnapping; (2) aggravated kidnapping; (3) object rape; and, (4) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner. *Id.* at p. 1235. The defendant appealed his conviction. One of the issues

on appeal was whether the jury was properly instructed on the definition of "in the commission of" as set forth in U.C.A. § 76-5-202(1)(d). *Id.* at p. 1244. The jury was provided with a definition of "in the commission of" which read, as follows:

> "The phrase 'in the commission of denotes a continuing chain of events. When there is close proximity in terms of time and distance between the aggravating circumstances and the homicide and there is no break in the chain of events from the inception of the aggravating circumstances to the homicide, the events are considered one continuous transaction." *Id.* at p. 1244.

Archuleta claimed the jury instruction was incorrect because "it failed to instruct the jury that if it found that any of the criminal acts inflicted on the victim were completed *before* the intent to commit the homicide was formed, then those offenses cannot be aggravating circumstances under ~~section~~ 76-2-202(1)(d)." *Id.* at p. 1244. The Court disagreed with Archuleta and held the jury instruction was proper in that it was consistent with the Court's decision in *State v. Johnson, supra,* 740 P.2d 1264. *Archuleta, supra*, 850 P.2d at pp. 1244-1245. In so holding, the Court explained the phrase "while committing" denotes a continuing chain of events from the inception of the felony to the time of the homicide, as follows:

> "The phrase 'while committing' denotes a continuing chain of events. . . . In other words, when there is a close proximity in terms of time and distance between the underlying felony and the homicide and there is **no break in the chain of events <u>from the inception of the felony</u> to the time of the homicide**, we

treat the two events as part of one continuous transaction."[14] *Id.* at p. 1245, bold and underline emphasis added.

The Court further explained "**[s]ection 76-5-202(1)(d) requires only that the defendant intentionally cause the death of the victim.**" *Id.* at p. 1245, bold and underline emphasis added.

Archuleta, supra, actually supports the Defendant's contention because the Court found that the chain of events begins with the "inception of the felony" which means the felony must be in progress when the homicide is committed. The State's contention that the homicide was not completed until Arnett died and, therefore, the kidnapping had commenced is *not* supported by *Archuleta, supra,* or *Johnson, supra.* These cases analyze situations where the defendant commits the act that causes the death of another after the felony was already in progress.

2. The felony murder rule does not apply in this case.

The State contends that the trial court erred in refusing to bind Defendant over under the felony murder rule based on its having erroneously concluded that the kidnapping must have been in progress at the time that the murder occurred. The felony murder rule requires that "the actor is engaged in the commission . . . of any predicated offense . . . " and "a person other than a party . . . is

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[14] Similarly, in *State v. Johnson, supra,* 740 P.2d at pp. 1267-1268, the Court found that if "there is no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction."

killed in the course of the commission of . . . any predicate offense." U.C.A. § 76-5-203(2)(d)(ii). Hence, a person must be killed after the predicate offense has already commenced in order for the felony murder rule to apply. Therefore, the State's contention is erroneous for the same reasons articulated hereinabove with respect to the inapplicability of U.C.A. § 76-5-202(1)(d).

3. The mens rea required for kidnapping necessarily conflicts with the mens rea for aggravated murder.

The State's brief does not address an important issue that was argued in the trial court, to wit, the act that caused the death of Arnett occurred *simultaneously* with the act that commenced the alleged kidnapping; and, there is an inherent conflict in the requisite mental state for the crimes of aggravated murder and kidnapping.

Aggravated murder, kidnapping, and aggravated kidnapping are all specific intent crimes. U.C.A. §§ 767-5-202, 76-5-301, 76-5-302. Each crime requires the defendant consciously desire to engage in the conduct or cause the result, to wit, death or a detention or restraint, respectively. Furthermore, it is well settled law that "[a] kidnapping begins when the detention begins to be 'against the will of the victim." *State v. Couch,* 635 P.2d 89, 93 (Utah 1981).

Under the circumstances of this case, the Defendant could *not simultaneously* possess both the "intent to kidnap" and the "intent to kill." R529:525-523. The "intent to kidnap" necessarily entails an intent to keep the victim alive, at least for a brief period of time. Conversely, the "intent to kill" entails a conscious desire to cause death.

Hence, the mental states are contradictory, inconsistent, and/or mutually exclusive. In the case at bar, the State contends Defendant "intended to kill" Arnett when Simmons hit him with the baseball bat. However, the act that caused the death of Arnett *simultaneously* commenced the alleged kidnapping. Therefore, at that point in time, Defendant either intended to kidnap or kill Arnett, he could *not simultaneously* intend to do both.

The trial court acknowledged the foregoing argument was correct at the hearing on Defendant's motion to quash (R738:20) and explained the kidnapping must have already been in progress at the time Arnett was struck with the bat in order for section 76-5-202(1)(d) to apply. R738:20. Otherwise, the intent to kill would directly conflict with the intent to kidnap; the Defendant could *not* simultaneously possess the intent to kill and the intent to kidnap; and, therefore the court would have to find that the Defendant did not have the intent to kill. R738:20.

CROSS-APPELLANT'S BRIEF

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues presented by Cross-Appellant/Defendant *Sean Graham* are as follows:

Issue No. 1: Was sufficient evidence presented at the preliminary hearing to support a reasonable belief the defendant committed the crime of kidnapping.

Standard of Review: "The determination of whether to bind a criminal defendant over for trial is a question of law" (*State v. Clark,* 2001 UT 9, ¶ 8, 20 P.3d 300), which is

reviewed "without deference to the Court below." *State v. Schroyer,* 2002 UT 26, ¶ 8, 44 P.3d 730. "Utah Code Ann. § 76-1-104 [. . .] requires that the provisions of the code be interpreted so that the elements of a crime are clearly defined." *State v. Germonto,* 2003 UT App 217, ¶ 17, 73 P.3d 978. "[The] United States Supreme Court has directed that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *State v. Bradshaw,* 2004 UT App 298, ¶ 18, 99 P.3d 359. Thus, "'[w]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when [the Legislature] has spoken in clear and definite language.'" *Ibid.*

Preservation: This issue was preserved at R101:16-21; 23-28; 32-34.

Issue No. 2: Is the "other personal gain" portion of U.C.A § 76-5-202(1)(g) unconstitutional on its face and/or as applied?

Standard of Review: The standards of review are the same as Issue No. 1.

Preservation: This issue was preserved at R101:30; R142:13-20.

SUMMARY OF ARGUMENT

Cross-Appellant's Issue No. 1: A Defendant cannot be convicted of kidnapping for conduct traditionally considered to be an integral element of another crime. The detention, restraint, and/or movement of Arnett must be more than slight, inconsequential and merely incidental to the homicide. Mere incidental restraint and movement during the course of a homicide are not, standing alone,

indicia of a true kidnapping otherwise every murder would automatically constitute aggravated murder.

Cross-Appellant's Issue No. 2. The portion of the aggravated murder statute that elevates a crime from murder to aggravated murder based on a finding that the defendant committed the murder for "other personal gain" (U.C.A. § 76-5-202(f)) is unconstitutional because it: (1) fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited; (2) it impermissibly delegates basic policy matters to prosecutors, policemen, judges, and juries for resolution on an ad hoc and subjective basis;[15] and, (3) it does not provide a meaningful basis for distinguishing those few cases in which the death penalty is imposed from the cases in which it is not.[16]

ARGUMENT

Cross-Appellant's Issue No. 1: Was sufficient evidence presented at the preliminary hearing to support a finding of probable cause to believe that the Defendant committed the crime of kidnapping?

Defendant contends in order to be bound over for kidnapping or aggravated kidnapping, the trial court was required to find the detention, restraint, and/or movement of Arnett was more than slight, inconsequential, and/or

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[15] *State v. Germonto*, 2003 UT App 217, ¶ 11, 73 P.3d 978, 980-981; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[16] *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Andrews v. Shulsen*, 600 F.Supp. 408, 423-424 (D. Utah 1984).

merely incidental to the homicide.[17] There are no cases in Utah that address this issue. Consequently, Defendant has provided this Court with pertinent authority from other jurisdictions.[18]

In *State v. Green, supra,* 94 Wash.2d 216, 616 P.2d 628,[19] the defendant was convicted of kidnapping and murder. The kidnapping elevated the crime of murder to aggravated murder. The restraint and/or movement of the victim was "estimated variously by the prosecuting attorney as from 20 to 50 feet." (*Id.*, at 635.) The Washington Supreme Court concluded: "[A]lthough appellant lifted and moved the victim to the apartment's exterior loading area, it is clear these events were actually an integral part of

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[17] See *State v. Green,* 616 P.2d 628 (Wash. 1980); *State v. Saunders,* 86 P.3d 232, 241, (Wash. App. 2004); *State v. Brett,* 126 Wash.2d 136, 166, 892 P.2d 29 (1995); (*State v. Vernon,* 867 P.2d 407 (N.M. 1993); *State v. Korum,* 86 P.3d 166, 173-174; *State v. Innis,* 433 A.2d 646, 655 (R.I. 1981); *Alam v. State,* 776 P.2d 345 (Alaska 1989); *State v. McDonald,* 872 P.2d 627, 660 (Alaska 1994); *State v. Rich,* 305 N.W. 739 (Iowa 1981); *State v. McGrew,* 515 N.W.2d 36 (Iowa 1994); *State v. Estes,* 418 A.2d 1108 (Maine 1980); *Wright v. State,* 581 P.2d 442 (Nevada 1978); *Hampton v. Clark County Sheriff,* 591 P.2d 1146 (Nevada 1979); *State v. Fulcher,* 243 S.E. 338 (N.C. 1978); State v. Beatty, 495 S.E. 367 (N.C. 1998); *State v. Logan,* 397 N.E. 1345 (Ohio 1979); *State v. Curtis,* 298 M.W.2d 807 (S.D. 1980); *State v. Anthony,* 817 S.W.2d 299 (TN. 1991); *State v. Miller,* 336 S.E. 910 (Va. 1985).

[18] When Utah is devoid of authority on a particular issue, it is appropriate to seek guidance from other jurisdictions. *State v. Montiel,* 2005 UT 48, ¶ 15, 531; *State v. Wanosik,* 2003 UT 46, ¶ 23, 79 P.3d 937; *State v. Heaps,* 2000 UT 5, ¶ 12,999 P2d 565; *State v. Vessey,* 967 P.2d 960, 962 (UT App 1998).

[19] *State v. Green, supra,* 616 P.2d 628 was cited by the Utah Supreme Court in *State v. Russell,* 733 P.2d 162, 167 (UT 1987) as authority on the issue of a defendant's right to jury unanimity as to which category of crime he committed. Hence, the Supreme Court of Utah is aware of decision in *State v. Green, supra,* 616 P.2d 628 and relied on it in support its holding on a different issue.

and not independent of the underlying homicide." *Ibid.* "While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping." *Ibid.* The *Green, supra,* court further explained "under the kidnapping statute a movement of the victim does not constitute an asportation [sic] unless it has significance independent of the assault." *Id.* at p. 636. "And, unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault – the movement does not manifest the commission of a separate crime." *Ibid.* "'Restraint' by an ultimate killing does not, in and of itself, establish kidnapping." *Ibid.* "[The kidnapping statute] contemplates employment of a deadly force that stops short of actual homicide." *Ibid.* "When the State establishes a killing it may have proved a homicide or, some other crime, but it has not established kidnapping." *Ibid.* "In the broadest sense the infliction of a fatal wound is the ultimate form of 'restraint' because it obviously 'restrict(s) a person's movements . . . in a manner which interferes substantially with (the person's) liberty.'" *Ibid.* "If such logic is applied to the law of kidnapping, [. . .] every intentional killing would also be a kidnapping because the killing itself would supply the requisite 'restraint' (i.e., the killing being the ultimate form of restraint)." *Ibid.* Moreover, every intentional killing would automatically become murder in the first degree." *Ibid.*

In discussing the intent behind the initiative, the court stated, "the initiative carefully set out seven specific circumstances in which a first degree murder could be elevated into a crime punishable by death." *Ibid.* "It did

not, either specifically or by inference, indicate that its purpose was to automatically convert every intentional killing into aggravated murder in the first degree punishable by death." *Ibid.* "Thus, we are compelled to conclude evidence of the killing itself does not establish the 'restraint' necessary to prove kidnapping based on restraint by the use of deadly force." *Ibid.*

In *State v. Saunders,* 120 Wash.App. 800, 86 P.3d 232, 241 (Wash. App. 2004), the court did not apply the rule as set forth in *Green, supra,* because under the facts and circumstances before it the kidnapping *was not incidental* to the rape because acts of the defendant were *above and beyond* the *conduct required* or even *typical* in the commission of rape. **It explained the concept of one crime being *merely incidental* to another *originates* from the merger doctrine case law but it is *separate and distinct.*** *State v. Saunders, supra,* 86 P.3d at p. 241. "'[E]vidence of restraint and movement merely incidental to a homicide is insufficient to establish kidnapping as an element of the murder.' [*State v. Harris,* 36 Wash.App. 746, 752, 677 P.2d 202 (Wash.1984).]" *State v. Saunders, supra,* 86 P.3d at p. 241. "To determine whether a crime is incidental to the 'actual crime charged,' the court must look to 'the facts and circumstances surrounding the crime and the nature of the acts and their relation to the crime." *Id.* at p. 242. "The merger doctrine prevents 'pyramiding the charges.'" *Ibid.* "The doctrine applies where 'the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).'" *Ibid.* "Merger applies 'only

when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.'" *Id.*, at 243.

In *State v. Korum,* 120 Wash.App. 686, 86 P.3d 166, 173-174, (Wash. App., 2004), the Court of Appeals of Washington applied the rule set forth in *State v. Green, supra,* in a case where the defendant was convicted of robberies and kidnapping. The Court held that the evidence was insufficient to convict the defendant of kidnapping because the *restraint and movement* of the victim was *merely incidental* to the robberies.

In *State v. Vernon,* 116 N.M. 737, 867 P.2d 407, 411 (N.M., 1993), the Supreme Court of New Mexico followed the holding and rationale of *State v. Green, supra,* 616 P.2d at pp. 636-637. In reversing the defendant's conviction the Court stated: "We agree, however, with the holding of the Washington Supreme Court in *State v. Green,* [. . .] that '*the mere incidental restraint and movement* of a victim which might occur during the course of a homicide *are not, standing alone, indicia of a true kidnapping.*' *Id.* at p. 635, underline emphasis added. "Vernon may well have thought that killing Stevens would be to his benefit and that it would be better to kill him in a location where there would be fewer witnesses than at the 7-11." *Id.* at p. 411. "Still, whatever benefit Vernon saw in taking Stevens to a remote location, *the movement was merely incidental to the murder.*" *Id.* at p. 411, underline emphasis added. "If we accept the State's construction of the kidnapping statute, then we effectively would allow any murder when there is incidental movement of the victim to be punishable as first-degree murder, even without proof of premeditation or perpetration of a felony." *Id.* at p. 411. "In essence, we would allow the State to convict a defendant of kidnapping

simply by proving that the defendant committed a murder and that the defendant moved the victim." *Ibid.* "The legislature, however, did not intend that this scenario be construed as kidnapping, as evidenced by the specific enumeration of elements in our kidnapping statute." *Ibid.*

In *State v. Innis,* 433 A.2d 646 (R.I., 1981), the Supreme Court of Rhode Island reversed a conviction for kidnapping and held the confinement and asportation of a cab driver had no significance independent of being robbed and murdered. "The true test in each case is not mere mileage but whether the movements of the victim 'substantially increase the risk of harm' beyond that inherent in the crime of robbery itself. [California citations omitted]." *Id.,* at p. 654. According to the *Innis, supra,* court: "The history of our statute and the experience of other jurisdictions suggest that conduct that was traditionally considered to be an integral element of another crime cannot be punished as kidnapping." *Id.,* at p. 655. "[T]*he kidnapping statute should only be applied to 'conventional' kidnappings.*" *Ibid.,* underline emphasis added. "To apply the wording of the statute in a literal manner would run the risk of kidnapping convictions based on trivial changes in location having 'no bearing on the evil at hand.'" *Ibid.* "[A] confinement or imprisonment must have some independent significance." *Ibid.* "Thus, any movement of a victim during the course of a crime cannot be punished as a kidnapping unless such movement exceeds that necessary to facilitate the crime at hand." *Ibid.*

In 1969, the California Supreme Court reconsidered the degree of asportation needed to sustain a kidnapping conviction and held: "[W]hen in the course of a robbery a defendant does no more than *move his victim around inside the premises* in which he finds him – whether it be a

residence, as here, or a place of business or other enclosure – his conduct generally will not be deemed to constitute the offense [of kidnapping for ransom, reward, extortion, rape, or robbery; punishment]." *People v. Daniels,* 71 Cal.2d 1119, 1140, 459 P.2d 225, 238 (Cal. 1969).

Alaska, Iowa, Maine, Nevada, North Carolina, Ohio, South Dakota, Tennessee, and West Virginia have also adopted the foregoing rule of law.[20]

Here, the undisputed facts are that Arnett: (1) was hit in the head with a bat by Simmons on two completely separate and distinct occasions; (2) was knocked unconscious by the second blow to the head; (3) was not moved or confined until *after* he received the second blow to the head when he was placed in a closet that was less than three feet from where he fell to the floor; (4) never regained consciousness; and, (5) his death was caused by blunt force trauma to the head. There was absolutely no evidence presented at the preliminary hearing that the placement of Arnett's body in the closet in any way caused or contributed to his death. R169.

The act restraint, detention, and subsequent movement of Arnett less than three (3) feet from where he fell to the floor, was purely *incidental or subsidiary* to the

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[20] See *Alam v. State,* 776 P.2d 345 (Alaska 1989); *State v. McDonald,* 872 P.2d 627, 660 (Alaska 1994); *State v. Rich,* 305 N.W. 739 (Iowa 1981); *State v. McGrew,* 515 N.W.2d 36 (Iowa 1994); *State v. Estes,* 418 A.2d 1108 (Maine 1980); *Wright v. State,* 581 P.2d 442 (Nevada 1978); *Hampton v. Clark County Sheriff,* 591 P.2d 1146 (Nevada 1979); *State v. Fuicher,* 243.S.E. 338 (N.C. 1978); State v. Beatty, 495 S.E. 367 (N.C. 1998); *State v. Logan,* 397 N.E. 1345 (Ohio 1979); *State v. Curtis,* 298 M.W.2d 807 (S.D. 1980); *State v. Anthony,* 817 S.W.2d 299 (Tn. 1991); *State v. Miller,* 336 S.E. 910 (VA. 1985).

homicide and was an *integral part* of the homicide. *State v. Green,* 95 Wash.2d 216, 616 P.2d at 628, 635 (Wash. 1980). Siunce [sic] the restraint/detention and/or movement of Arnett had no significance independent of the homicide, no kidnapping occurred. *Ibid.*

Cross-Appellant's Issue No. 2: Is the "other personal gain" portion of U.C.A § 76-5-202(1)(f) unconstitutional on its face and/or as applied?

Defendant contends the portion of the aggravated murder statute that elevates a crime from murder to aggravated murder on the basis of "other personal gain" (U.C.A. § 76-5-202(f)) is unconstitutionally vague and/or overbroad because it: (1) fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited; (2) impermissibly delegates basic policy matters to prosecutors, policemen, judges, and juries for resolution on an ad hoc and subjective basis;[21] and, (3) does not provide a meaningful basis for distinguishing those few cases in which the death penalty is imposed from the many cases in which it is not.[22]

In *Andrews v. Shulsen,* 600 F.Supp. 408, 424 (D.C. Utah 1984), an issue before the District Court was the constitutionality of the portion of Utah's aggravated murder statute that elevates a crime from murder to aggravated murder if the murder is committed by the defendant for "other personal gain". U.C.A. § 76-5-202(1)(g). Therein, the District Court explained that "[a]

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[21] *State v. Gernaonto,* 2003 UT App 217, ¶ 11, 73 P.3d 978, 980-981; *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972).

[22] *Godfrey v. Georgia,* 446 U.S. 420, 427 (1980); *Andrews v. Shulsen,* 600 F.Supp. 408, 423-424 (D. Utah 1984).

capital sentencing system must provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" *Andrews v. Shulsen, supra,* 600 F.Supp. at p. 424. "This means that if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Ibid.* "Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Ibid.* "It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Ibid.*

Therein, the District Court held that the aggravating circumstance of killing for personal gain, as further defined by the instruction presented to the sentencing authority in that case, satisfied the foregoing rules. *Ibid.* According to the District Court, the other personal gain circumstance provided a meaningful standard for distinguishing those cases where the death penalty may be imposed and it contained a clear and objective and makes the process rationally reviewable.

The fundamental problem with the District Court's opinion in *Shulsen, supra,* is the court did not engage in its own analysis of this issue. Instead, the District Court relied on the principal enunciated in *Zant v. Stephens,* 462 U.S. 862, 889, fn. 25 (1983), to wit, even if an aggravating circumstance is constitutionally deficient, the ultimate result is unaffected where the death sentence is support by the finding of at least one other aggravating circumstance. *Shulsen, supra,* 600 F.Supp. at p. 424. In *Shulsen, supra,*

the jury found five (5) other aggravating circumstances to be true. *Ibid.* Therefore, the District Court did not need to analyze this issue.

In *State v. Lovell,* 1999 UT 40, ¶ 39, 984 P.2d 382, the defendant contended that the "other personal gain" aggravating circumstance was facially vague and overbroad. *Ibid.* The Court found that the "other personal gain" aggravating circumstance was constitutional on its face. *Ibid.* However, the Court relied exclusively on *Andrews v. Shulsen, supra,* 600 F.Supp. 408, 424. The problem with the Court's reliance on *Andrews v. Shulsen, supra,* is that the District Court never analyzed the issue because there were other aggravating factors present. In *Lovell, supra,* 119 UT 40, ¶ 39, the Court merely referred to the definition of "other personal gain" that was purportedly found acceptable by the District Court in *Andrews v. Shulsen, supra,* to wit, "killing so as to gain a substantial advantage or to rid oneself of substantial difficulty [such as] to silence a witness." *Lovell, supra,* 119 UT 40, ¶ 39. In *Lovell, supra,* there were at least two other aggravating factors present and, therefore, the constitutionality of the "other personal gain" language contained within 76-5-202(g) was not as important as it would have been had it been the only aggravating factor present. *Ibid.* Consequently, the Court summarily dealt with the issue. *Ibid.*[23]

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[23] In *State v. Shaffer,* 725 P.2d 1301, 1307 (Utah 1986), the defendant contended that the "other personal gain" portion of the aggravated murder statute (U.C.A. § 76-5-202) was unconstitutionally vague in violation of the 8th and 14th Amendments to the United States Constitution and article I, sections 7 and 9 of the Utah Constitution. The Court did not address the constitutionality of the "other personal gain" aggravating circumstance because the defendant was also found guilty of aggravated robbery, which was also the basis for a

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Defendant contends: (1) the trial court erroneously found the murder was committed for "other personal gain"; (2) this aggravating factor is unconstitutional on its face and as applied; (3) the statute is void for vagueness since it does not provide a person of ordinary intelligence a reasonable opportunity to know what it prohibited; and, (4) the statute impermissibly delegates basic policy matters to prosecutors, policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Defendant further contends the "other person gain" statute is unconstitutionally vague and overbroad is because it does not sufficiently narrow the class of persons that are eligible to receive the death penalty; and, nearly every intentional homicide could be viewed in some manner as having been committed for some personal gain thereby subjecting the perpetrator to the death penalty.

"A statute is **unconstitutionally vague** if it: (1) fails to provide a 'person of ordinary intelligence a reasonable

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separate and distinct aggravating circumstance pursuant to U.C.A. § 76-5-202(1)(d). *Id.* at p. 1307. Consequently, the Court did not address the constitutionality of "other personal gain." *Ibid.*

Similarly, in *State v. Young,* 853, P.2d 327, 336-338 (Utah 1993), the defendant challenged the constitutionality of the "pecuniary or other personal gain" aggravating circumstance contained with the aggravated murder statute. U.C.A. § 76-5-202. In *Young, supra,* 853 P.2d at p. 337, the jury found two aggravating circumstances under U.C.A. § 76-5-202(d) and (f) [now (g)]. *Ibid.* The Court found that the "pecuniary or other personal gain" subdivision was no unconstitutional because the defendant had reasonable notice that this subdivision applied to killing the victim and taking her purse, money, credit cards, etc. *Ibid.* The Court further found that even if the "pecuniary or other person gain" subdivision was unconstitutional, any error was harmless due to the presence of the aggravating circumstance under subdivision (d). *Ibid.*

opportunity to know what is prohibited.'; (2) 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . .' *Germonto, supra,* 2003 UT App 217, ¶ 11; *Grayned, supra,* 408 U.S. 104, 108-09.

In the case at bar, "at the end of the day" the "other personal gain" aggravating circumstance may be the only basis for elevating the crime of murder to aggravated murder. Consequently, the constitutionality of this aggravating circumstance may be of utmost importance in this case. The relative importance of this issue will depend on how the Court decides on other issues that are currently before the Court in this appeal.

The "other personal gain" portion of U.C.A. § 76-5-202(1)(g), is so vague and ambiguous that it could literally be applied in every homicide because the defendant will invariably gain something from having committed the homicide. The "other personal gain" portion of U.C.A. § 76-5-202(1)(g) does not provide notice of what is prohibited and it allows prosecutors, judges and juries to apply this circumstance on an ad hoc basis. Defendant also contends that this subdivision is unconstitutional as applied in this case. The District Court found the "other personal gain" obtained by the Defendant as a result of the homicide was that the Defendant was able to leave the Academy. However, no evidence was presented that Arnett was killed because the Defendant wanted to "gain a *substantial* advantage" or "rid himself of a *substantial* difficulty".

Defendant further contends the specific aggravating circumstance in U.C.A. § 76-5-202(f) must be applied, rather than the "other personal gain" catch-all provision.

"[It] is well settled that a more specific provision always takes precedence over a more general provision." *State v. Hinson,* 352 Utah Adv. Rep. 10, 966 P.2d 273, 277 (UT App. 1998.) In this case, "escape from lawful custody" or "for the purpose of avoiding or preventing an arrest" (U.C.A. § 76-5-202(1)(f)) is more specific than "other personal gain" U.C.A. § 76-5-202(1)(g). Defendant contends that even if the homicide was committed so that he could leave the Academy (a facility where he was not imprisoned, in custody, or otherwise confined by a lawful court order), it does *not* constitute "other personal gain." Therefore, U.C.A. § 76-5-202(1)(e) controls; and, the State cannot arbitrarily invoke the catch-all "other personal gain" provision because the other circumstances do not apply.

Therefore, subdivision (g) of the aggravated murder statute is unconstitutional on its face and/or as applied in this case.

CONCLUSION

Defendant/Appellee/Cross-Appellant Sean Graham respectfully requests this Court: (1) deny the State's request to reverse the portions of District Court's order quashing portions of the amended bind over order; and, (2) reverse the portions of the District Court's order wherein the court failed to grant Defendant's motion to quash the charges of kidnapping and aggravated kidnapping and the aggravating circumstance of other personal gain.

Dated: October 11, 2005

Respectfully submitted,

/s/ David Kindopp
LAW OFFICE OF
DUNCAN M. JAMES
Attorney for Defendant/
Appellee/Cross-Appellant,
Sean Graham

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Mendocino. I am over the age of eighteen years and not a party to the within above October 11, 2005, I served the within BRIEF OF APPELLEE/CROSS-APPELLANT by placing a true copy thereof enclosed is a sealed envelope with postage thereof fully prepaid, in the United States mail box at Ukiah, California, addressed as follows:

Scott Garrett
Iron County Attorney
97 North Main, Suite #1
Cedar City, Utah 84720

Laura Dupaix, Assistant Attorney General
Utah Attorney General's Office
160 East 300 South
P.O. Box 140854
Salt Lake City, UT 84114-0854

I, Leslie Snyder, declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of October, 2005, at Ukiah, California.

/s/ Leslie Snyder
Leslie Snyder